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No. 80-2033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARLOS ROMERO-BARCELO, GOVERNOR OF PUERTO RICO, *et al., Petitioners,*

v.

CASPAR M. WEINBERGER, SECRETARY OF DEFENSE, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Government of Puerto Rico may obtain judicial review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1976), of violations of Military Construction Authorization Acts that do not expressly provide any means for public or private enforcement?

2. Whether the Government of Puerto Rico has an implied right of action for injunctive and declaratory relief — not damages — to prevent violations of these Acts?

3. Whether, under the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.* (1976), a state may seek injunctive relief against a federal agency for violations of a state nuisance law that proscribes excessive noise?

LIST OF ALL PARTIES

The Petitioners, Appellants in the Court below, are Governor Carlos Romero-Barceló on behalf of the Government of Puerto Rico, Radames Tirado Guevara, Mayor of Vieques, Puerto Rico, and the Environmental Quality Board of Puerto Rico.

The Respondents, Appellees in the Court below, are Caspar M. Weinberger, Secretary of Defense, John F. Lehman, Jr., Secretary of the Navy, Thomas B. Hayward, Chief of Naval Operations, Harry D. Train, II, Commander in Chief of the Atlantic Fleet, and Robert H. Barrow, Commandant of the Marine Corps.[1]

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[1] The Respondents, Defendants in the trial court, are all officials of the Department of Defense who are sued in their official capacities. The Respondents named above have been substituted for the originally named Defendants pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

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v.

CASPAR M. WEINBERGER, SECRETARY OF DEFENSE, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Governor of Puerto Rico, Carlos Romero-Barceló, *et al.* (hereinafter "Puerto Rico"), petitions for a writ of certiorari to review a portion of the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The slip opinion of the Court of Appeals for the First Circuit (App. A, *infra*, pp. 1a-54a) was issued on January 26, 1981. The prior decision and order of the trial court sitting in the United States District Court for the District of Puerto Rico (App. C, *infra*, pp. 57a-178a) is reported at 478 F. Supp. 646.

JURISDICTION

The Judgment of the Court of Appeals for the First Circuit was entered on January 26, 1981 (App. B, *infra*, pp. 55a-56a), and a request for rehearing was denied on

February 27, 1981 (App. D, *infra*, p. 179a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent sections of the statutes involved in this petition are reproduced in Appendix E. These statutory sections are as follows:

Section 2(g) of the Administrative Procedure Act, 5 U.S.C. § 551(13);

Section 10 of the Administrative Procedure Act, 5 U.S.C. § 701(a);

Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702;

Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704;

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706;

The Military Construction Authorization Act of 1971, Pub. L. No. 91-511, 84 Stat. 1204 (1970);

The Military Construction Authorization Act of 1972, Pub. L. No. 92-145, 85 Stat. 394 (1971);

The Military Construction Authorization Act of 1974, Pub. L. No. 93-166, 87 Stat. 611 (1973);

Section 4 of The Noise Control Act of 1972, 42 U.S.C. § 4903 (1976);

Section 12 of The Noise Control Act of 1972, 42 U.S.C. § 4911 (1976).

STATEMENT

This petition arises out of the military training activities conducted by the Navy on the Puerto Rican island of Vieques. Subject matter jurisdiction for the

original complaint and this petition is based upon the federal question statute, 28 U.S.C. § 1331. The federal questions raised by Puerto Rico arise under several federal environmental statutes, including the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.* (1976), and three separate Military Construction Authorization Acts: Pub. L. No. 91-511, 84 Stat. 1204 (1970), Pub. L. No. 92-145, 85 Stat. 394 (1971), and Pub. L. No. 93-166, 87 Stat. 611 (1973).

During the height of the Vietnam era, the United States Navy conducted air-to-ground bombing and ship-to-shore shelling of targets on the sparsely populated Puerto Rican island of Culebra. By 1970, substantial civilian and governmental opposition had developed to the military operations on Culebra. The opposition became so intense that Congress addressed the subject in three different Military Construction Authorization Acts promulgated in the early 1970's.

These Acts required the Navy to consult with Puerto Rico and report to Congress prior to any proposed shift of these bombing and shelling activities to an alternate site in Puerto Rico. Congress, in response to the considerable controversy generated by the bombing and shelling of Culebra, intended to prevent such a controversy from developing at a new target site.

Contrary to the statutory requirements of these Acts, the Navy in 1971 began methodically and clandestinely to transfer the Culebra training activities to the nearby Puerto Rican island of Vieques. By the end of 1975, the Navy had transferred to Vieques all of the Culebra military activities that could be moved to Vieques. Internal documents prepared by the Navy not only admitted that a clandestine transfer of activities was occurring but also emphasized the need for continued secrecy in order to avoid sparking opposition by the

residents of Vieques and the Government of Puerto Rico.

Prior to the transfer of bombing and shelling activities, Vieques was a tranquil island with a population of approximately 7,000 — nearly 10 times the population of Culebra. The Navy possessed title to over 79 percent of the land on Vieques and, before the build-up in the mid-1970's, used this land principally for small-scale artillery training. Vieques was never used as a target for the sort of socially and environmentally disruptive bombing and shelling activities that had been conducted on Culebra.

The character and quality of life on Vieques were drastically affected by the Navy's clandestine transfer of Culebra bombing and shelling to Vieques. Noise levels increased. Fishermen were denied access to the island's best fishing grounds. Coral reefs and other forms of aquatic life were destroyed. Archeological sites were devastated. Wildlife were killed and harassed. Residents were exposed to the frightening and dangerous risk of errant ordnance — some of which have missed their targets on this tiny island by at least six miles. The Navy's transfer of military training operations to Vieques has provoked controversy throughout Puerto Rico. Individuals have been injured in protests over these Navy activities.

In an effort to compel the Navy to comply with statutory restrictions against the transfer of Culebra activities to Vieques, and with the requirements of several federal environmental statutes, the Petitioners filed this action in the United States District Court for the District of Puerto Rico on March 1, 1978, against the Secretary of Defense and officials of the Navy. The case was tried between September and December of 1978 before the Honorable Judge Juan R. Torruella.

Judge Torruella ruled in favor of Puerto Rico on several of its claims. He found that the Navy had violated the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.* (1976 & Supp.I) (App. C, *infra,* pp. 83a-86a), the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1976) (App. C, *infra,* pp. 165a-170a), and the National Historic Preservation Act of 1966, 16 U.S.C. § 470 *et seq.* (1976) (App. C, *infra,* pp. 142a-147a). Judge Torruella, however, rejected Puerto Rico's claim that the Navy had violated the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.* (1976) (App. C, *infra,* pp. 107a-118a). Judge Torruella also rejected the claim raised by Puerto Rico under the Military Construction Authorization Acts (App. C, *infra,* pp. 147a-158a).

There were a number of alternative grounds for the lower court's ruling on the Military Construction Authorization Acts claim. Judge Torruella first concluded that these Acts did not constitute an "agreement" by the Navy not to transfer Culebra training to Vieques (App. C, *infra,* pp. 153a-154a). He also ruled that the several directives and Presidential orders that implemented these Acts did not give rise to a private cause of action in favor of Puerto Rico (App. C, *infra,* p. 154a). He further held that Puerto Rico had not stated a cognizable claim under the First or the Fifth Amendments to the Constitution (App. C, *infra,* p. 158a).

Puerto Rico then appealed portions of the decision of Judge Torruella to the United States Court of Appeals for the First Circuit. With respect to the unlawful transfer issue, Puerto Rico asserted that the trial court had misinterpreted Puerto Rico's arguments and therefore had failed to reach the merits of Puerto Rico's claim that the Navy had violated the Military Construction Authorization Acts. Puerto Rico never argued that

the Navy executed some sort of agreement not to transfer Culebra training to Vieques. Instead, Puerto Rico raised only the narrower, more limited argument that the Acts established a procedure for the selection of an alternative site. Puerto Rico further argued that the uncontroverted evidence demonstrated that the Navy did not comply with the procedure required by these Acts.

Puerto Rico and the Navy both briefed and argued the transfer issue in the Court of Appeals for the First Circuit. Following oral argument, the Court of Appeals *sua sponte* requested the parties to brief the additional issue of whether any of the appellants could assert a cause of action for violation of the Acts. After receiving the requested supplemental briefs, the Court of Appeals, like the trial court, declined to decide the precise issue raised by Puerto Rico.

Although the Court of Appeals ruled that Puerto Rico had standing to raise the transfer issue, the Court decided that no private right of action in favor of Puerto Rico could be implied from the texts of these Acts (App. A, *infra,* pp. 9a-17a). As an alternative basis for its decision, the Court stated that the alleged transfer of Culebra training to Vieques was not an "agency action" that could be reviewed under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1976) (App. A, *infra,* p. 18a).

The Court of Appeals also ruled that it lacked subject matter jurisdiction to consider Puerto Rico's claim that the Navy had violated the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.* (1976) (App. A, *infra,* p. 40a). The Court reasoned that the citizens suit provision in Section 12 of the Act, 42 U.S.C. § 4911, did not provide a means for the enforcement of state noise control laws (App. A, *infra,* p. 34a). The Court also reasoned that the other asserted basis for subject matter jurisdiction, Section 4 of the Act, 42 U.S.C. § 4903, was

specifically limited to the same sort of quantitative noise limits referenced in Section 12 of the Act and therefore did not encompass Puerto Rico's nuisance statute (App. A, *infra,* pp. 35a-40a).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With Consistent Judicial Interpretations Of Agency Action That Is Subject To Judicial Review Under The Administrative Procedure Act.

The ruling of the Court of Appeals for the First Circuit severely restricted the right of all parties such as Puerto Rico to seek judicial review of Executive Branch decisions under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1976) ("APA"). In an unprecedented interpretation of the APA, the Court found that the Act provided only for the review of agency rulemakings, agency adjudications or agency sanctions (App. A, *infra,* p. 18a). This interpretation is flatly contrary to the Act's express application to agency actions such as administrative "orders" and to "failures to act" in compliance with statutory or regulatory requirements. 5 U.S.C. § 551(13). It is also contrary to several decisions of this Court and abundant precedent in the lower courts.

Review under the APA is triggered only if there is "agency action" as that term is defined in Section 2(g) of the Act, 5 U.S.C. § 551(13). Prior to the First Circuit's decision, "agency action" subject to review under the APA was not limited to formal rulemakings, adjudications, or sanctions. Instead, the APA was interpreted to encompass a great variety of agency decisions, ranging from discrete orders to consistent patterns of conduct. *See, e.g., Federal Trade Commission* v. *Standard Oil Co. of California,* _____ U.S. _____, 66 L.Ed. 2d 416, 423 n.7 (Dec. 15, 1980); *Chrysler Corp.* v.

Brown, 441 U.S. 281 (1979); *Atlantic Richfield Co.* v. *Federal Energy Administration*, 556 F.2d 542, 552 (Em. Ct. App. 1977); *National Automatic Laundry & Cleaning Council* v. *Schultz*, 143 U.S. App. D.C. 274, 443 F.2d 689, 698-702 (1971); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 654 (10th Cir. 1971); *Nuclear Data, Inc.* v. *Atomic Energy Commission*, 344 F. Supp. 719, 722-23 (N.D. Ill. 1972). In the words of this Court, "[t]he legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions . . ." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).

The physical movement of Culebra training activities to Vieques and the intensification of shelling and bombing activities on Vieques must be "agency action." Agency action also was involved in the numerous decisions and directives issued by the Secretary of the Navy and the Secretary of Defense to implement this transfer. These decisions and directives clearly were "orders" within the meaning of Section 2(g) of the APA, 5 U.S.C. § 551(13). The Navy also failed to negotiate with Puerto Rico or consult with Congress prior to the selection and utilization of an alternate site for the Culebra bombing and shelling activities. This constituted a "failure to act" in compliance with the law within the meaning of Section 2(g) of the APA, 5 U.S.C. § 551(13).

The Court of Appeals' interpretation of "agency action" not only conflicts with consistent judicial precedent but also conflicts with other rulings in this same case. Puerto Rico successfully obtained APA review for its claims arising out of the same Navy activities under two other statutes: the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1976) ("NEPA") and the National Historic Preservation Act of 1966, as

amended, 16 U.S.C. § 470 *et seq.* (1976) ("NHPA"). It is well settled that the APA is the basis for reviewing violations of these statutes. *See, e.g., United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 684-90 (1973) (NEPA); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972) (NEPA); *Aluli* v. *Brown*, 437 F.Supp 602, 608-09 (D. Haw. 1977), *reversed in part on other grounds*, 602 F.2d 876 (9th Cir. 1979) (*per curiam*) (NHPA); *Save the Courthouse Committe* v. *Lynn*, 408 F.Supp. 1323, 1330-31 (S.D.N.Y. 1975) (NHPA). If the bombing and shelling activities challenged by Puerto Rico were "agency action" for the purposes of these statutes, then these same activities must be "agency action" for the purpose of the Military Construction Authorization Acts.

The decision of the Court below has implications that extend far beyond the case at bar. "Agency action" is the threshold requirement for all cases brought under the APA. At issue, therefore, is whether the "broad spectrum of administrative actions" that were intended to be encompassed within the APA can be narrowed by a restrictive interpretation of "agency action." This Court has not explictly defined this most significant term. 5 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 43.01, at 43-10 (1978). The instant petition offers an appropriate opportunity to do so and thereby advise all lower courts and litigants of the types of administrative activities that may be reviewed under the APA.

II. The Decision Below Raises The Significant Unresolved Issue Of Whether The Absence Of An Implied Private Right Of Action Is A Basis For The Preclusion Of Review Under The Administrative Procedure Act.

This petition and the decision of the Court of Appeals also implicate the significant, unresolved legal relationship between judicial review under the APA and the absence of an implied private right of action under other

federal statutes. The APA expressly authorizes the review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). Puerto Rico submits that where, as here, a court rules that a party does not have a private right of action, the presumption in favor of judicial review militates strongly in favor of APA review. The Court of Appeals, however, improperly reasoned that the same factors that suggested that Congress did not intend to create a private right of action also affirmatively demonstrated that Congress intended to preclude judicial review (App. A, *infra*, pp. 18a-19a). This ruling confused the strict private right of action requirements with the more relaxed standards for APA review.

Judicial review may not be precluded unless "clear and convincing evidence discloses that Congress had both considered and prohibited judicial review of the agency action in question." *Kitchens* v. *Department of the Treasury*, 535 F.2d 1197, 1199 (9th Cir. 1976) (*per curiam*). *Accord, Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); *Hayes International Corp.* v. *McLucas*, 509 F.2d 247, 258-59 (5th Cir.), *cert. denied*, 423 U.S. 864 (1975). Contrary to the reasoning of the Court below, the absence of an intent to create a private remedy cannot be "clear and convincing evidence" that Congress intended to preclude review.

This Court recently recognized that a party who does not have an implied private right of action for damages nevertheless may obtain APA review of challenged federal agency action. *Cannon* v. *University of Chicago*, 441 U.S. 677, 707 n. 41 (1979) (". . . if no private remedy exists, the complainant is relegated to a suit under the Administrative Procedure Act . . ."); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317-18 (1979).

The lower courts consistently have applied this rule. *See, e.g., Local Division No. 714, Amalgamated Transit Union, AFL-CIO* v. *Greater Portland Transit District of Portland, Maine*, 589 F.2d 1, 14 (1st Cir. 1978); *Association of Data Processing Service Organizations, Inc.* v. *Federal Home Loan Bank Board*, 568 F.2d 478, 483 (6th Cir. 1977); *Carson* v. *Alvord*, 487 F.Supp. 1049, 1053 (N.D. Ga. 1980).

The threshold for obtaining APA review is lower than the threshold which must be satisfied for enforcement of an implied right of action. *Shannon* v. *United States Department of Housing and Urban Development*, 409 F.Supp. 1189, 1192 n. 14 (E.D. Pa. 1976), *aff'd*, 577 F.2d 854 (3d Cir.), *cert. denied*, 439 U.S. 1002 (1978). The party seeking APA review does not have to demonstrate that Congress intended to create the private remedy for its special benefit. *Cf. Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979) (implied right of action); *Universities Research Association, Inc.* v. *Coutu*, _____ U.S. _____, 49 U.S.L.W. 4354, 4358 (April 6, 1981) (implied right of action). Rather, the party need only demonstrate that it is aggrieved by final agency action within the meaning of Section 10(a) of the APA, 5 U.S.C. § 702. *See, e.g., Barlow* v. *Collins*, 397 U.S. 159 (1970); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

Most parties who are aggrieved by final agency action under a federal statute will not have an implied private right of action. Yet Congress plainly did not intend to limit the opportunities for these parties to obtain judicial review. Instead, Congress left them with a narrower choice of remedies: under the APA they could enjoin illegal agency actions but they could not obtain damages to redress their injuries. 5 U.S.C. § 706.

The decision of the Court below heralds a merging of implied right of action standards with the more relaxed standards for APA review. This approach may significantly restrict the opportunities for judicial review. Only those parties with express or implied private rights of action under federal statutes would then be able to secure judicial review. This result would contravene the clear intent of Congress in enacting the APA and the well-established presumption in favor of judicial review of administrative decisions under the APA. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); *Rusk* v. *Cort*, 369 U.S. 367, 379-80 (1962).

The APA is a vital mechanism for ensuring that Executive Branch decisions comply with the laws passed by Congress. In this regard, the Act is rooted in fundamental principles of judicial review that are traceable to this Court's landmark decisions in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), and *United States* v. *Nixon*, 418 U.S. 683 (1974). The interpretation of the Act by the Court of Appeals for the First Circuit in this case significantly undermines this ingrained system of judicial review and should not be permitted to stand.

III. The Decision Below Was A Significant And Unwarrented Extension Of The Standards Governing The Implication Of Private Rights Of Action.

In a recent series of decisions, this Court has substantially developed the law that governs the implication of a right of action for damages under federal statutes that do not expressly provide a damage remedy for violations of the statute. The seminal decision in *Cort* v. *Ash*, 422 U.S. 66 (1975), established a four-part test for the implication of a private right of action. This

test was subsequently refined in the decisions in *California* v. *Sierra Club*, _____ U.S. _____, 49 U.S.L.W. 4441 (April 28, 1981); *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO*, _____ U.S. _____, 49 U.S.L.W. 4383 (April 20, 1981); *Universities Research Association, Inc.* v. *Coutu*, _____ U.S. _____, 49 U.S.L.W. 4354 (April 6, 1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); and *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

The *Cort* v. *Ash* test, as refined by its progeny, left open the questions that are raised in this petition. How should the *Cort* v. *Ash* analysis be applied to an action that: (1) seeks declaratory and injunctive relief rather than damages, (2) is brought by a sovereign under statutes that expressly recognize the interests of the sovereign, and (3) involves statutes that provide no means for public or private enforcement?

This Court has not previously authorized the extention of the *Cort* v. *Ash* standards to an action by a sovereign for injunctive relief, rather than damages, in a situation where there was no alternative mechanism for enforcement of the federal law in question. Nevertheless, the Court below unquestioningly applied the *Cort* v. *Ash* analysis.

This Court in its recent decisions has cautioned against a mechanistic interpretation of the *Cort* v. *Ash* requirements. *See, e.g., Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-76 (1979). Consistent with this admonition, the *Cort* v. *Ash* analysis should be sensitive to the type of relief sought, the nature of the party seeking relief, and whether there

are alternative opportunities for enforcement of the federal statute in question. Each of these legally significant considerations militates in favor of a private right of action.

Actions for injunctive or declaratory relief are not designed to enrich private parties with funds from the public treasury. Rather, these actions serve the important law enforcement purpose of ensuring that federal agencies comply with the legal restrictions imposed upon these agencies by the Congress. This interest should be viewed as particularly acute where, as here, there is no express enforcement mechanism provided in the statute.

An action by a sovereign also presents a more compelling need for the implication of a cause of action than an action by a private party. One of the responsibilities of a sovereign is the enforcement of laws — both local and federal. A sovereign also is responsible for the protection of its citizens and environment. These dual responsibilities cannot be fully exercised unless the sovereign can bring legal actions to enjoin violations of federal law. This is a particularly compelling concern where, as here, the federal laws in issue expressly refer to the interests and welfare of a sovereign such as Puerto Rico.

Puerto Rico respectfully submits that this petition is the proper case for the consideration of these issues and the necessary further clarification of the *Cort* v. *Ash* standards.

IV. The Decision Of The Court Below Nullified The Requirement In The Noise Control Act Of 1972 That Federal Facilities Comply With State Noise Laws.

This Court has not yet interpreted the enforcement provisions of the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.* (1976). The instant petition presents a

compelling case for review of this important environmental statute because the Court below radically disturbed the Congressional scheme for the abatement of noise. The decision of the Court below also is legally significant because it exacerbates a conflict among the Circuit Courts of Appeal concerning the right of private parties to enforce federal environmental laws.

The Court of Appeals ruling effectively nullifies Section 4 of the Noise Control Act of 1972, 42 U.S.C. § 4903, which requires federal agencies and facilities to "comply with Federal, State, interstate and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements." The Court below reasoned that the citizens suit provision contained in Section 12 of the Act, 42 U.S.C. § 4911, authorized only actions for the review and enforcement of federal administrative regulations promulgated under the Act (App. A, *infra,* p. 34a). The Court therefore held that a citizens suit could not be maintained under Section 12 of the Act to enforce an agency's violation of the Section 4 requirement that federal facilities comply with state noise laws. However, the Court neglected to observe that the Act also does not provide for the enforcement of Section 4 by the federal government. The Court's decision therefore leaves no entity with the right to enforce the Congressional mandate in Section 4 of the Act that federal facilities comply with state noise laws.

The Court's nullification of Section 4 was attributable to its exclusive focus upon the "noise control requirements" that may be enforced through the citizens suit provision of Section 12 of the Act. The Section 12 definition of "noise control requirements," 42 U.S.C. §

4911(f), does not refer to the state noise laws described in Section 4. In focusing its attention exclusively upon this definition, the Court below overlooked the savings clause in the immediately preceding subsection, 42 U.S.C. § 4911(e). The savings clause provides that "[n]othing in this [citizens suit] section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any noise control requirement or to seek any other relief (including relief against an Administrator)." This savings clause clearly authorizes the private enforcement of noise laws in addition to the "noise control requirements" that are expressly defined in Section 12, 42 U.S.C. § 4911(f). This savings clause of Section 12 therefore is the basis for citizen enforcement against federal facilities of the state noise laws referred to in Section 4, 42 U.S.C. § 4903. Any other reading of the citizens suit provision would nullify Section 4.

This same legal issue has arisen in the context of similarly worded citizens suit provisions of the Clean Air Act, as amended, 42 U.S.C. § 7604 (1976), and the Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1976 and Supp. I). Although there is a conflict among the Circuit Courts of Appeal concerning the rights conferred upon private parties under the savings clause, most of the decided cases support Puerto Rico's interpretation. The Court of Appeals for the Second, Third and District of Columbia Circuits have ruled that the savings clause in the citizens suit provision preserves the rights of injured parties to enjoin violations of the Federal Water Pollution Control Act. *National Sea Clammers Association* v. *City of New York*, 616 F.2d 1222, 1225-31 (3d Cir.), *cert. granted sub nom. Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, _____ U.S. _____, 101 S. Ct. 314 (Oct. 14, 1980) (No. 79-1760); *Natural Resources*

Defense Council, Inc. v. *Callaway,* 524 F.2d 79, 83-84 (2d Cir. 1975); *Natural Resources Defense Council, Inc.* v. *Train,* 166 U.S. App. D.C. 312, 510 F.2d 692, 698-703 (1974). The Seventh Circuit, however, has rejected this interpretation with respect to the similarly worded citizens suit provision of the Clean Air Act. *City of Highland Park* v. *Train,* 519 F.2d 681, 690-93 (7th Cir. 1975), *cert. denied,* 424 U.S. 927 (1976). Now the First Circuit, in the context of the citizens suit provision of the Noise Control Act, has sided with the Seventh Circuit's reasoning.

Puerto Rico submits that these citizens suit provisions cannot reasonably be interpreted to prevent states and private citizens from enforcing the very laws they enacted to protect themselves from the degradation of their environment. This anomalous result is completely inimical to Congress' express directive that federal facilities should comply with state noise laws. This result also contravenes Congress' stated purpose of retaining for state governments the primary responsibility for controlling noise. *See* S. Rep. No. 92-1160, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 4655.

V. The Decision Of The Court Below Impermissibly Narrowed The Scope Of The Noise Control Act Of 1972.

As an alternative basis for its decision, the Court below held that federal facilities have no obligation under the Noise Control Act to comply with state nuisance laws that are used to control noise (App. A, *infra,* pp. 35a-39a). This ruling also was based upon the incorrect assumption that Congress intended to permit private parties to enforce only the sort of noise control requirements that were defined in Section 12 of the Act

(App. A, *infra,* pp. 38a-39a). The savings clause, however, expressly refers to noise control requirements under "*any* statute or common law." 42 U.S.C. § 4911 (e)(emphasis supplied). A nuisance statute containing noise control criteria clearly would be enforceable under the Act. This interpretation also is directly supported in the language in the Senate Report that ". . . States may reach or maintain levels of environmental noise which they desire through . . . nuisance laws." S. Rep. No. 92-1160, 92d Cong., 2d Sess. 6-7 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 4655, 4660.

The decision of the Court below necessarily means that the numerous state noise laws containing nuisance criteria cannot be enforced against federal facilities. This result will weaken the integrity and scope of the Act. As a result, many who live near federal facilities will continue to be exposed to excessive noise levels.

VI. The Decision Below Raises Unresolved Issues Of Vital Concern To The People And Environment Of Puerto Rico.

A most compelling reason for granting the petition is the vital importance of the issues raised in this petition to the people and environment of Puerto Rico. The record adduced at trial disclosed that the noise created by the use of live ordnance is excessive and significantly intrudes upon the daily life of Vieques' residents. The record also unequivocally documents the Navy's transfer of Culebra training activities to the island of Vieques. These actions contravened the Congressional mandate that the Navy consult with Puerto Rico and report to Congress prior to any transfer. This procedural requirement, which the Navy did not even attempt to satisfy, was plainly designed to protect the interests of Puerto Rico and to prevent the disruptive and dislocative effects of bombing and shelling from occurring at an alternative site in Puerto Rico.

The intrusion and hardship inflicted upon Puerto Rico and its island municipality of Vieques cannot be lightly dismissed. The Navy must be required to comply with the rule of law. The only way to protect the citizens of Vieques from ongoing Navy encroachment is to enforce the express requirements imposed by Congress. To decline review of Puerto Rico's case, already shunted aside improperly by the Court below on narrow jurisdictional grounds, would be to perpetuate this injury and foster the appearance that Congressional measures aimed at protecting Puerto Rico's citizens are unenforceable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 28, 1981

APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 79-1626

CARLOS ROMERO-BARCELO, ETC., ET AL.,

PLAINTIFFS-APPELLANTS,

v.

HAROLD BROWN, ET AL.,

DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. JUAN R. TORRUELLA, *U.S. District Judge*]
(478 F. Supp. 646)

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Timothy L. Harker and *John A. Hodges*, with whom *Peabody, Rivlin, Lambert & Meyers*, *Lewis A. Rivlin*, *Miguel Gimenez Munoz*, Secretary of Justice, Government of Puerto Rico, *Thomas L. Lincoln*, Department of Justice, *Gerardo A. Carlo*, Special Counsel to the Governor of Puerto Rico, *Jorge L. Cordova*, *Lawrence White*, and *Jeffrey N. Martin* were on brief, for appellants.

Anne S. Almy, Attorney, Department of Justice, with whom *Capt. Thomas E. Flynn*, *Lt. Cmdr. Eugene M. Pinkelmann, Jr.*, Office of the Judge Advocate General, Department of the Navy, *Richard M. Cornelius*, Assistant General Counsel, Department of the Navy, *Sanford Sagalkin*, Acting Assistant Attorney General, *Peter R. Steenland, Jr.*, *Dorothy R. Burakreis*, and *Edward J. Shawaker*, Attorneys, Department of Justice, were on brief, for appellees.

January 26, 1981

BOWNES, *Circuit Judge*. The Commonwealth of Puerto Rico appeals from the district court's denial of its request for a comprehensive injunction against the United States Navy's military training operations on the Island of Vieques, a muni-

cipality of the Commonwealth. Armed with a battery of federal and state laws, Puerto Rico[1] alleged that the Navy's[2] activities in and around Vieques cause irreparable injury to the island's ecology and its inhabitants. More specifically, Puerto Rico claimed that the Navy's operations pollute the island's air and its coastal waters, threaten the habitats of endangered species and many of the island's irreplaceable historical sites, and diminish the productivity of the island's fishing and agricultural resources. The Commonwealth also claimed that the Navy transferred certain training activities from the island of Culebra to Vieques, contrary to congressional and executive directives. After an extensive trial, the district court ordered the Navy to obtain a NPDES permit, prepare an environmental impact statement and obtain a determination on the eligibility of certain historical and prehistorical sites on the island for inclusion in the National Register of Historic Places. The court otherwise ruled in the Navy's favor and refused to enjoin the training operations. *Barcelo* v. *Brown*, 478 F. Supp. 646 (D.P.R. 1979). Before turning to the issues raised by Puerto Rico on appeal, we briefly sketch some basic characteristics of the island and the Navy's activities.

Vieques

The island of Vieques lies six miles off the southeastern coast of Puerto Rico and approximately nine miles directly south of the island of Culebra. Situated on an east-west axis, Vieques

[1] Appellants — Governor Carlos Romero-Barcelo on behalf of the Commonwealth of Puerto Rico; Radames Tirado Guevara, Mayor of Vieques; and the Board on Environmental Quality — are hereinafter collectively referred to either as Puerto Rico or the Commonwealth.

[2] Appellees — Harold Brown, Secretary of Defense; W. Graham Claytor, Jr., Secretary of the Navy; James L. Holloway, Chief of naval Operations; I.C. Kidd, Jr., commander in Chief of the Atlantic Fleet; and Louis H. Wilson, Commandant of the Marine Corps — are hereinafter collectively referred to as the Navy.

is nearly twenty miles long with an average width of four miles. Of a total area of approximately 33,000 acres, the Navy owns 25,231.72 acres, or slightly more than 76% of the island.

Certain features of the island's ecology deserve particular mention. Fringe and offshore coral reefs are found in the coastal waters of Vieques, primarily off the northern, eastern and southern shores. Seagrass flourishes along the ocean floor adjacent to the coasts; the largest concentration runs from Punta Caballo on the north coast eastward around Punta Arenas to the southwest coast. There are also several large mangrove stands located along the shores; in the west near Punta Arenas and in the south around Puerto Mosquito, Puerto Ferro and Ensenada Honda. Three of the seven bioluminescent bays known to exist in the world are located along the southern coast -- Puerto Mosquito, Puerto Ferro, and Bahia Tapon.

Of the animal species living on Vieques, six are designated by the U.S. Fish and Wildlife Service as either "endangered" of "threatened." 50 C.F.R. § 17.11. The "endangered" are the manatees, the brown pelicans, the leatherback turtles and the hawksbill turtles. Considered "threatened" are the green turtles and the loggerhead turtles. At least some of the nesting sites favored by the pelicans and the turtles are located within the areas where the Navy conducts its training operations.

The human history of the island dates back at least to the ninth century A.D.[3] At that time, Vieques served as a transit stop in the migration of Arawak Indians from the Orinoco Basin in South America (Venezuela) to Puerto Rico and Hispaniola (Haiti and the Dominican Republic). At the time of Columbus' "discovery" of Vieques in 1493, the island was used by the Carib Indians as a temporary base from which they carried out raids against the people of Puerto Rico.

[3] Inconclusive archeological evidence suggests the presence of a preceramic Indian culture as early as the second century A.D.

Spain's movement into the Caribbean during the sixteenth century resulted in the first permanent habitation of Vieques by Indians who sought to escape the Spanish occupation of Puerto Rico and St. Croix. Although Spain apparently never attempted to colonize Vieques, it periodically sent military expeditions to the island throughout the seventeenth and eighteenth centuries to maintain its hegemony over the island.

The early years of the nineteenth century mark the beginning of Vieques' modern history. In 1816 colonists from St. Croix and St. Thomas established the first livestock ranches, thus beginning what is today the island's primary agricultural activity. Soon thereafter, one of the colonists organized the construction of a fort at Isabel Segunda. In addition to ranching, the economy of Vieques at this time involved timber harvesting for export to the Virgin Islands, subsistence farming and fishing. By the second half of the century, sugar cane had become the leading cash crop.

After the Spanish American War of 1898, Vieques, together with the rest of Puerto Rico, became a Territory of the United States. The island's economy continued to be dominated through the early 1940's by sugar cane cultivation, ranching, and fishing. Since the mid 1940's, however, the sugar cane industry has declined to a point where it is of no current importance to the island. Thus, the islanders now derive their livelihood from the same sources relied upon by their ancestors more than one hundred fifty years ago - fishing, subsistence farming and ranching.

During the early 1940's the Navy acquired title to most of its present holdings on Vieques. As a result of these acquisitions, civilians now occupy an area of about 7,000 acres, bounded on both the east and the west by Navy property.[4] The present population distribution reflects the island's economy. Of a

[4] At the time of trial, the Navy also owed a small parcel within the civilian sector. It has since been conveyed to the Commonwealth of Puerto Rico.

total population of approximately 8,000, close to 5,000 people live in a rural environment outside the two coastal towns. Located on the northern coast of the civilian sector is the capital, Isabel Segunda, which has between 2,400 and 2,500 inhabitants. Esperanza, the island's other town, located on the southern coast, has a population of approximately 600.

Navy Operations on Vieques

The Naval Ammunition Facility (NAF) encompasses the entire area of Vieques west of the civilian zone. The Navy uses the facility for deep storage of conventional ammunition. Ships delivering the ordnance[5] dock at Mosquito Pier, located on the northern coast of the NAF. From there, it is transported by truck to bunkers distributed throughout the NAF. Most of the ammunition is destined for off-island use by the Navy, the Marines and the Puerto Rican National Guard. Occasionally, ammunition is transferred overland from the NAF to the ground maneuver area located east of the civilian zone.

The Navy's installations on the eastern half of Vieques are part of a large military complex known as the Atlantic Fleet Weapons Training Facility, headquartered at Roosevelt Roads Naval Station in Ceiba, Puerto Rico. The facility consists of four firing ranges of which only two are related to Vieques. The outer range, a large area of ocean, at its closest points to Vieques lies thirty-five miles to the north and twenty miles to the south. Within this range, the Navy conducts exercises in ship to ship weapons fire, ship to air missile fire and air to air weapons fire. The underwater range, located off the western shore of St. Croix, involves training in three dimensional

[4] At the time of trial, the Navy also owned a small parcel within the civilian sector. It has since been conveyed to the Commonwealth of Puerto Rico.

[5] Both the parties and the district court refer to "ammunition" and "ordnance" interchangeably. Although we accept this usage for purposes of this case, it is our understanding that "ordnance" includes weapons as well as ammunition.

tracking of surface and underwater objects. The electronic warfare range is a network of "threat platform" simulators located in Puerto Rico and nearby islands. These are used to train shipboard and airborne electronic warfare teams and provide tactical electronic order of battle support for operations conducted on the other ranges. One simulator is positioned at the western end of Vieques atop Monte Pirata. Until recently, the inner range consisted of air to ground bomb and missile targets and naval gunfire support targets on Culebra, and air to ground, artillery and naval gunfire support targets on Vieques. In 1975, however, the Navy ceased its Culebra operations. Thus, the Vieques installations now comprise the entire inner range.

The inner range is divided into four distinct areas. The ground maneuver area (GMA) extends from the civilian sector eastward for approximately seven miles to a cattle fence which runs the width of the island. Located at the southwestern corner of the GMA is Camp Garcia, a Marine Corps camp which, although able to accommodate several thousand troops, is occupied by one marine. The principal use of the GMA is for Marine amphibious landings. These are conducted throughout the year, primarily on the southern beaches between Punta Conejo and Punta Negra. A typical landing will require the use of large attack transports from which are launched the landing craft and amphibious tracked vehicles. These smaller craft carry troops, tanks and other equipment to the beaches. Once landed, the troops perform maneuvers throughout the GMA, which at times include artillery fire. Upon completion of the land exercise the troops embark from the beaches and return to the attack transports. An amphibious landing usually is accompanied by low-level support flights by fixed wing jet aircraft and helicopter gunships. An amphibious exercise may involve anywhere from two to twenty thousand troops; it may be independent of other inner range operations, or it may be part of a single large-scale maneuver in concert with the Navy's sea and air forces.

The surface impact area (SIA) begins about one mile east of the cattle fence and extends approximately two and one-half miles east to a "firebreak" designated as the western friendly front line. Artillery training, strafing and air to ground bombing, the latter two using inert ammunition only, occur within this area. The artillery is positioned near the western border of the SIA — about six miles from the nearest point in the civilian zone — loaded with live ammunition and fired at targets located in the eastern part of the SIA. Air to ground bombing is directed at two bullseye targets. Target #2 is situated about one-half mile east of the SIA's western boundary; target #1 is on a point along the northern half of the western friendly front line. The strafing targets are located at the southern most point of the firebreak.

The Air Impact Area (AIA), also known as the Close Air Support Zone (CAS), runs from the western friendly front line eastward for about two miles to the eastern friendly front line. This area, in which live ammunition is used, contains as targets mockups of two surface to air missile sites, an airstrip, a fuel farm and an ammunition dump. There are also two remote controlled moving targets inland and six naval gunfire support targets along the southern coast of the AIA. No targets exist in the area between the eastern friendly front line and Punta Este, the easternmost point of Vieques. An infrequently used water target lies about one mile east of this point.

Air and sea operations in the inner range occur about 200 days out of a year, usually between 7:30 a.m. and 10:00 p.m. Operations are directed by observers positioned in an observation post on Cerro Matias, located in the southeastern part of the SIA. Aircraft taking off from the Roosevelt Roads airfield or a carrier located north of Vieques first fly north of Vieques and then circle around the eastern coast to approach the range from the south. Aircraft taking off from carriers located south of Vieques use a straight approach from that direction. Any aircraft carrying ammunition, whether live or inert, is prohi-

bited from flying over the civilian area. As best as can be estimated, an aircraft training in the range would ordinarily come no closer than within five and three-quarters miles of the civilian zone.

Ship to shore gunnery directed at the naval gunfire support targets in the AIA is also restricted to a southern approach. When firing, the ships are usually positioned between three and eleven miles off the southern shore of the AIA. All ship to shore firing occurs within a designated danger zone, which permits the Navy to prohibit all civilian navigation while the area is in use.

The Issues on Appeal

Puerto Rico challenges the district court's rulings on the following issues:[6]

1. Did the Navy "transfer" training activities from Culebra to Vieques in violation of certain Military Construction Authorization Acts?

2. Does the dropping of ordnance into the coastal waters of Vieques violate the Puerto Rico Water Quality Standards, contrary to the requirements of § 313 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1323(a)?

3. Did Congress intend to permit a private cause of action to enforce § 13 and § 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407, 409?

4. Does the danger zone regulation promulgated by the Corps of Engineers, 33 C.F.R. § 204.234, unreasonably restrict the food fishing industry of Vieques contrary to 33 U.S.C. § 3?

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[6] The Navy did not appeal the district court's order requiring the Navy to obtain a NPDES sewage discharge permit, prepare an environmental impact statement and obtain a determination on the eligibility of certain historical and prehistorical sites for inclusion in the National Register of Historic Places.

5. Do the Navy's training activities generate such noise as to create a public nuisance in violation of Puerto Rico's criminal nuisance statute, P.R. Laws Ann. tit. 33, § 1365, and the requirements of § 4 of the Noise Control Act, 42 U.S.C. § 4903(a)?

6. Do the Navy's activities on Vieques violate the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543?

7. Does the Navy's survey of historical sites on Vieques satisfy the requirements of § 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, Executive Order 11593 and 36 C.F.R. § 800.4?

8. Should the Navy be enjoined from conducting training operations on Vieques?

After oral argument, we requested that the parties submit supplemental briefs on the question of whether any of the plaintiffs have a right of action to challenge the alleged violations of certain military authorization acts and executive branch directives related to training activities on Culebra and Vieques. With the benefit of briefs from both parties, we first address that question.[7]

Right to Challenge the Alleged Transfer of Military Training Activities

Puerto Rico alleged that the Navy "clandestinely" has transferred training operations from Culebra to Vieques, contrary to the "clear command" of the Military Construction Authorization Acts of 1971, 1972 and 1974. The district court rejected this contention, ruling that the statutes do not estab-

[7] Because we understand the district court's decision on this question to include a determination that Puerto Rico had failed to state a claim upon which relief can be granted, we reject the Commonwealth's contention that the issue is not properly before us. The Navy raised this issue in its answer and the district court ruled, *inter alia*, that Puerto Rico had failed to establish the existence of a judicially enforceable mandate. 478 F. Supp. at 697-700.

lish an enforceable mandate, and expressed serious doubt that a transfer of activities actually had occurred. On appeal, Puerto Rico argues that the trial court's narrow view of the acts ignores Congress' "carefully crafted" statutory "procedure" intended to protect the interests of the Commonwealth; Puerto Rico also challenges the court's finding that a transfer did not in fact occur. Our initial task is to ascertain whether Congress intended to permit the Commonwealth,[8] or any other party, to seek judicial enforcement of the three authorization acts. As with any question of statutory interpretation, we begin with an examination of the language of the statutes and the related executive branch directives. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 16 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979).

In October 1970 Congress adopted the Military Construction Authorization Act of 1971, Pub. L. No. 91-511, 84 Stat. 1204. Section 611(a) of the Act directed the Secretary of Defense "to prepare a report of the weapons training now

[8] Although the Commonwealth's standing as parens patriae in an action against the Navy may be questioned, *compare Commonwealth of Pennsylvania* v. *Kleppe*, 533 F.2d 668 (D.C. Cir. 1976) *with Washington Utilities & Transp. Comm'n* v. *F.C.C.*, 513 F.2d 1142 (9th Cir. 1975), we think the Commonwealth certainly has standing to raise this issue on the basis of the alleged injuries to its quasi-sovereign interest "in all the earth and air within its domain," an interest that is "independent of and behind the titles of its citizens . . . ." *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). *Cf. Massachusetts* v. *Mellon*, 262 U.S. 447, 482 (1923) (acknowledging the distinction between a state's quasi-sovereign interest in the environment and its status as parens patriae). *See also Missouri* v. *Holland*, 252 U.S. 416, 431 (1920). Because we conclude that Puerto Rico has alleged "a 'distinct and palpable injury' . . . 'fairly traceable' . . . to the challenged conduct" of the Navy, *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 73 (1978) (citations omitted), we need not decide whether the Mayor of Vieques or the Board on Environmental Quality have standing to litigate this case. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 263-64 (1977).

being conducted in the Culebra complex . . . ." The Secretary was ordered to evaluate "all possible alternatives, geographical and technological," and make "recommendations for . . . moving all or part of such activities to a new site or sites," giving particular consideration to six factors:

(1) the safety and well-being of the people who live on Culebra;

(2) the natural and physical environment of Culebra and adjoining cays and their recreational value;

(3) the development of a sound, stable economy in Culebra;

(4) the unique political relationship of Culebra and Puerto Rico to the United States;

(5) the operational readiness and proficiency of the Atlantic Fleet; and

(6) national security.

Section 611(b) provided that the report was to be prepared in consultation "with the people of Culebra, the Government of Puerto Rico, and all appropriate federal agencies." Finally, the Navy was directed to "avoid any increase or expansion of the present weapons range activities in the Culebra complex and, wherever possible, without degrading the activities, to institute procedures which will minimize interference with the normal activities and the solitude of the people of Culebra."[9]

On April 1, 1971, Secretary of Defense Laird transmitted to Congress and the President the mandated report. In a press release issued the same day, the Secretary announced that he had ordered the Navy "to institute immediately a number of actions which will enhance the safety and well being of the residents of Culebra and reduce the irritants to them resulting from Navy training." The Secretary also expressed his inten-

[9] On January 11, 1971, the Navy entered into an agreement with the Government of Puerto Rico which imposed certain restrictions on the Culebra operations and also contained the Navy's assurance that it would "continue to investigate both technological and geographical alternatives to the training done around Culebra."

tion to reappraise the situation by the end of 1972 and make a final decision about where to relocate the Culebra operations.

With the enactment in 1971 of § 207 of the Military Construction Authorization Act of 1972, Pub. L. No. 92-145, 85 Stat. 394, Congress directed the Secretary of Defense to prepare a new study of "the most advantageous alternative [to the Culebra training complex] on the basis of investigations which consider cost, national security, the operational readiness and proficiency of the Atlantic Fleet, the impact on the environment, and other relevant factors." On December 27, 1972, Secretary Laird submitted his report and recommendations to the President and Congress. In an accompanying letter he identified Vieques as the best of the available alternative sites but concluded "that the Culebra complex offers such advantages over all other alternatives studied that none of these other alternatives can be considered reasonable." Relocation to Vieques "would significantly reduce the capability of the Inner Range and would transfer the training activity from an island with 700 inhabitants to one with 7,000 inhabitants," an "[im]prudent course of action." Thus, he recommended "that the Navy retain its training targets in the Culebra complex," yet "remain abreast of developments that would modify . . . the Navy's need" for the Culebra range.

In the following spring of 1973, Secretary Laird's successor, Elliot Richardson, informed the Secretary of the Navy that it was in the Defense Department's long-range interest to transfer the Culebra training activities to the islands of Desecheo and Monito by July 1, 1975. This relocation was to occur, however, only after Congress had appropriated the necessary funds and the Navy had achieved a "satisfactory overall arrangement with the government of Puerto Rico for carrying out the proposed move and for insuring the long-term continuation of the Atlantic Fleet Weapons Range and the Fleet Marine Force training area."

Congress responded to this change in the Defense Department's position with the enactment in 1973 of the Military Construction Authorization Act of 1974. Pub. L. No. 93-166, 87 Stat. 668. Section 204(a) of the Act authorized the appropriation of $12,000,000 to facilitate the relocation of the Culebra training operations. But § 204(b) "expressly conditioned [the relocation] upon the conclusion of a satisfactory agreement to be negotiated by the Secretary of the Navy ... with the Commonwealth of Puerto Rico and reported to the Committees on Armed Services of the Senate and the House of Representatives prior to execution of such agreement." Congress directed that "the agreement shall provide, among other things, that the Commonwealth of Puerto Rico shall insure that (1) Commonwealth lands suitable for carrying out operations of the type referred to in subsection (a) will be made available for the long-term continued use of the Atlantic Fleet Weapons Range and Fleet Marine Forces training areas by the Navy, including, but not limited to, present areas and facilities on the island of Vieques ...."

Despite the absence of an agreement between the Navy and Puerto Rico, on June 22, 1974, Secretary of State Kissinger, acting as National Security Adviser, informed the Secretary of Defense of the president's decision to terminate the training activities on Culebra by July 1, 1975, and those on the Culebra Cays by December 31, 1975. Kissinger directed the Secretary of Defense "to consider and select alternative sites for the weapons range activities" and stated that "[t]he selection of the new site, if it is in Puerto Rico, will be contingent on its being acceptable to the Commonwealth ...." The Navy has ceased its operations on Culebra and negotiations continue over the selection of a new site.

When Congress has not expressly provided for private enforcement of a statute, there is little likelihood that the legislative history will disclose whether Congress nonetheless intended that result. *Cannon* v. *University of Chicago*, 441

U.S. 677, 694 (1979). Thus, the statutory language becomes the best evidence of Congress' intent. As the Supreme Court recently recognized, in each of its earlier cases that did imply a private cause of action the statute in question either conferred a federal right on private parties or proscribed certain conduct. *Touche Ross & Co.* v. *Redington*, 442 U.S. at 569. Implicit in this observation is that the absence of statutory language that either prohibits some action or confers rights weighs heavily against implication of a private cause of action.

Neither the Military Construction Authorization Act of 1971 nor the 1972 Act creates rights or proscribes conduct of any relevance to this case. The 1971 Act's partial restriction of the Navy's activities in Culebra was unrelated to Navy operations on the other islands of the Commonwealth. In contrast, the 1974 Act made the relocation of the Navy's Culebra operations contingent on the execution of an agreement between the Navy and Puerto Rico. But even if we characterize this as a limited prohibition,[10] it appears from the language of the pertinent provision and the accompanying committee report that the condition was imposed to benefit the Navy rather that Puerto Rico. Section 204(b) required that the agreement contain assurances from the Commonwealth "that Commonwealth lands suitable for carrying out operations . . . will be made available for the long term continued use of the . . . Navy, including, but not limited to, present areas and facilities on the island of Vieques . . . ." Not only does this language impose an obligation on the Commonwealth rather than the

[10] Congress' requirement of an agreement prior to relocation was effectively a prohibition only with respect to the expenditure of the $12,000,000. Without mention of the 1974 Act, President Nixon subsequently ordered the termination of the Culebra operations, ignoring the safeguards required by the Act. The Navy never expended the $12,000,000 appropriation and Congress eventually reallocated the amount to a Navy construction project in the Indian Ocean area. *See* Supplemental Appropriation and Recission Act, Pub. L. No. 96-304, 94 Stat. 857 (July 8, 1980).

Navy, but it forecloses negotiation over the training areas and facilities on Vieques. In the same vein, the joint conference report that accompanied the final draft of the Act states:

> The restrictive language in Section 204 is a result of discussion with the Governor and others and the conferees believe it provides sufficient protection to the Navy upon relocation of ship-to-shore gunfire operations from Culebra to the other Islands mentioned.

H.R. Rep. No. 634, 93d Cong., 1st Sess. 35 (1973). If Congress had intended to create a private right of action, it would have provided first for a right or duty upon which private enforcement could be based. But the authorization acts leave Puerto Rico without a place to hang its hat; the statutes grant no right to the Commonwealth, nor do they impose an obligation on the Navy for the benefit of the Commonwealth.

Puerto Rico argues that the authorization acts reflect Congress' intention to obligate the Navy to confer with other parties, particularly the Commonwealth, prior to any transfer of the Culebra operations. As part of that argument, Puerto Rico maintains that Congress anticipated that the agreement mandated by the 1974 Act would provide for "other things" beyond the Commonwealth's assurances of an adequate alternative site. The Commonwealth contends that this phrase undoubtedly was intended to encompass provisions for the protection of its environment and the welfare of its citizens; Congress impliedly sought to prevent a recurrence of the ecological and political problems created by the Navy's use of Culebra. Puerto Rico concludes that as the party most to be benefitted from this inferred congressional prohibition of unilateral Navy action, it must be granted a cause of action to vindicate Congress' intent.

Other than the phrase "among other things," however, Puerto Rico is unable to direct us to one provision in any of the three acts that establishes the mandate it seeks to enforce. Instead, it relies primarily on the "necessary" inferences to be

drawn from the statutes and the executive branch directives; Puerto Rico interprets the latter documents to corroborate its position. But the expansive inferences drawn by Puerto Rico, which we do not find to be free from doubt, must be contrasted with the limited nature of the legislation. The 1971 Act and the 1972 Act, as related to Vieques, directed the Secretary of Defense to prepare two feasibility reports; that is all. The 1974 Act did mandate execution of an agreement prior to relocation from Culebra. So far as the statute provides, however, we know only that Congress intended by this condition to protect the Navy's training capacity. Congress may have had a clear collective understanding of what "other things" were at issue, and the preferred resolution, but it chose not to reflect this in its 1974 legislation. Instead, it left to the parties the task of hashing out an agreement, subject to congressional, not judicial, review. The absence of any enforcement scheme in the authorization acts reinforces our conclusion that Congress intended that the controversy surrounding the Navy's training activities in Puerto Rico be resolved in the political sphere. Implication of a private cause of action would be contrary to the apparent intent of Congress, and, given the lack of a judicially enforceable mandate, a futile gesture.

Puerto Rico relies on the various executive branch directives principally to corroborate its interpretation of the authorization acts. As a second line of argument, however, it maintains that the directives have independent significance as sources of a private right of action. Unlike the situation presented by the three statutes, at least one of the directives contains a provision which ordered the Navy to obtain the Commonwealth's agreement prior to a relocation of the Culebra operations. In 1974 National Security Adviser Kissinger, on behalf of the President, directed the Secretary of Defense to end the Culebra operations and select a new site contingent on its being acceptable to the Commonwealth. Puerto Rico contends that this

order imposed a legal obligation on the Navy that is enforceable by the Commonwealth. We conclude, however, that the President's order does not have the force and effect of law and thus is not enforceable by an implied private cause of action.

The Commonwealth attempts to cloak the 1974 presidential order with statutory authority, characterizing it as in furtherance of the 1974 Act. But in fact the order essentially ignored what we perceive to be the intent of Congress as evidenced in the Act. Rather than require the Commonwealth to insure alternative sites prior to a relocation of the Culebra operations, as Congress mandated, the President ordered termination of those operations without any prior assurances from Puerto Rico. Moreover, the order granted the Commonwealth a veto over the Navy's choice of an alternative site; nothing in the Act suggests that Congress intended such a role for the Commonwealth. When the President issued this order, he necessarily relied not on any statutory authority, but on his constitutional authority as the chief executive and the commander in chief of the armed forces. As such, the President has the power to direct the activities of the military but he is without the authority to legislate. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 578, 587-88 (1952). Without some basis in an act of Congress, the directive cannot constitutionally be invested with the status of law, *see independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228, 234-36 (8th Cir. 1975), thus obviating a decision on the question of an implied cause of action.[11]

[11] The other executive branch directives invoked by Puerto Rico do not require extensive comment. The statements of Secretary Laird, to the extent they pertain to Vieques, contain nothing more than certain recommendations based on the Department's evaluation of the island and the other potential relocation sites. Secretary Richardson's memorandum to the Secretary of the Navy does not address the transfer of Culebra operations to Vieques. He ordered relocation to the uninhabited islands of Desecheo and Monito and

The Commonwealth's reliance on section 10 of the Administrative Procedure Act as an alternative source for a cause of action founders upon the limitations inherent in the Act. Section 10(a) of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. But assuming that the Navy did "transfer" the Culebra activities to Vieques, that action is not "agency action."

Section 2 of the APA defines agency action to include "the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act . . . ." *Id.* § 551(13). Each of the types of action included within this definition is separately defined in § 2. *See id.* § 551(4), (6), (8), (10), (11). All but one of these specific definitions refer to one of two forms of regulatory activity — agency rulemaking or agency adjudication. "Sanction" is defined to include, in addition to regulatory activity, "any agency . . . destruction, taking, seizure or withholding of property." *Id.* § 551(10).

The Navy's transfer of military training activities did not remotely involve rulemaking or adjudication, nor, at least in this case, did it result in the "destruction, taking, seizure or withholding of property." We recognize that Congress intended the APA to span a "broad spectrum of administrative actions." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). Nonetheless, the language of § 2 evidences that Congress intended to reach only actions that are administrative, and we conclude that the challenged activities of the Navy do not fall within that spectrum. *But see Standard Oil Co. of Ca.* v. *F.T.C.*, 596 F.2d 1381, 1384-85 (9th Cir. 1979).

Even if we were to accept that the "transfer" constituted agency action, we would characterize it as action "committed

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required the Commonwealth's participation only with respect to the implementation of the plan and protection of the Atlantic Fleet's interests. Moreover, Richardson's directive was essentially superseded by the President's 1974 order.

to agency discretion by law," 5 U.S.C. § 701(a)(2), and thus unreviewable. This exception to § 10's broad entitlement to judicial review applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[12] *Citizens to Protect Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971), *quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). *See Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317 (1979). The question before us presents one of those rare instances. The Commonwealth has cited as the applicable constraint on the Navy's training activities the Military Construction Authorization Acts of 1971, 1972 and 1974. But, as we have already explained in some detail, those statutes do not provide the judiciary with any "law to apply."*

We affirm the district court's ruling that with respect to the alleged transfer of military training activities from Culebra to Vieques, Puerto Rico has failed to state a claim upon which relief can be granted.

Pollution of the Coastal Waters

1. Puerto Rico Water Quality Standards

Section 313 of the Federal Water Pollution Control Act Amendments subjects every "department, agency, or instru-

[12] Because we conclude that the authorization acts are of no relevance to the Navy's authority to conduct the Vieques operations, we need not undertake the more detailed analysis set forth in *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970), to determine the applicability of the "committed to agency discretion" exception of 5 U.S.C. § 701(a)(2). *Cf. Carter* v. *Colon*, No. 80-1666, et al., slip op. at 4-6 (1st Cir. Oct. 24, 1980) (recent application of the *Hahn* analysis).

* Our conclusion that the authorization acts do not impose a duty on the Navy to the benefit of the Commonwealth also undermines the Commonwealth's reliance on 28 U.S.C. § 1361. That statute grants the "district courts original jurisdiction of any action in the nature of mandamus to compel an officer . . . of the United States . . . to perform a duty owed to the plaintiff." *Id. See Falzarano* v. *United States*, 607 F.2d 506, 513 (1st Cir. 1979).

mentality of the executive, legislative and judicial branches of the Federal Government" to "all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity." 33 U.S.C. § 1323(a). Puerto Rico alleged that the Navy, by dropping ordnance into the waters of Vieques, has violated several water pollution control regulations promulgated pursuant to the Commonwealth's Water Pollution Control[13] and Public Policy Environmental Control Acts.[14] The district court rejected this allegation, finding no violation of the water quality standards it deemed applicable to the Navy's activity. 478 F. Supp. at 664-69. On appeal, Puerto Rico asserts that, contrary to the trial court's opinion, there are three germane water quality standards that the Navy has violated.[15] We consider each separately.[16]

Article 2.1.1 of the Puerto Rico Water Quality Standards[17] provides:

> The waters of Puerto Rico shall not contain materials attributable to discharges that will settle to form objectionable deposits. Nor will they contain floating debris, scum, oil and other floating materials attributable to discharges in amounts sufficient to be unsightly or deleterious.

[13] P.R. Laws Ann. tit. 24, §§ 591-601.

[14] P.R. Laws Ann. tit. 12, §§ 1128-1142.

[15] Puerto Rico's reliance on the SB waters classification's prohibition of solids is misplaced. This prohibition of solids was part of the pre-1970 regulations, 24 P.R.R. & R. 598-5(a)(A) & (B), and has been superseded by Article 7.3 of the current Regulation, "Puerto Rico Water Quality Standards."

[16] We undertake this examination of the water quality standards without the benefit of any prior judicial or administrative interpretation.

[17] The "Puerto Rico Water Quality Standards" are designated as a single "Regulation." Each section of the Regulation is denoted an "Article." The Regulation is reprinted in Envir. Rep. — State Water Laws (BNA) 896:0301—: 0310.

Puerto Rico argues that the trial court erred in its interpretation of 2.1.1 by according determinative significance to the term "discharges," contrary to the purposes of the regulations and statute. We cannot agree. Article 2.1.1 expressly and exclusively addresses materials "attributable to discharges," which are defined as "[t]he outflow of wastewater from any ... source into receiving waters." Article 1. Turning to the definition of wastewater, we are directed to the definition of municipal wastes, which is "[w]ater carrying human and animal wastes from homes, buildings, industrial establishments and other places alone or in combination with industrial wastes." *Id.* No fair reading of this language warrants the conclusion that Article 2.1.1 applies to the bombing and shelling of coastal waters.

In contrast, the prohibitions annunciated in Article 2.1.3 are not limited in application to materials attributable to discharge. Article 2.1.3 directs that "[t]he waters of Puerto Rico shall not contain substances in concentrations or combinations which produce undesirable physiological responses in human, fish or other animal life, and plants." More specifically, subsection (A) establishes with respect to the coastal waters the "maximum allowable concentrations" of iron and certain other inorganic substances. Puerto Rico contends that the district court ignored the general prohibition of "substances ... which produce undesirable physiological responses" and erred in its finding that the Navy's activity did not result in a violation of the maximum allowable concentration of iron.

The weakness in Puerto Rico's first contention is that it reads into Article 2.1.3 an unjustifiable breadth in scope. Article 2.1.3 speaks not simply of "substances," which, admittedly, could be construed to encompass solids such as spent ordnance as well as other refuse. Rather, the regulation addresses "concentrations" or "combinations" of substances. Those terms appear to refer in this context to the presence of

chemicals and chemical processes rather than that of solids such as discarded ordnance. For example, the "maximum allowable concentrations" established by 2.1.3 are expressed in terms of milligrams per liter, hardly a measurement appropriate to shell casings or bomb remnants. And those limitations are devoted to the specification of allowable concentrations of minerals and pesticides, not those of solids. We conclude that the apparent thrust of this regulation is the control and abatement of chemical pollution. We therefore agree with the district court that the sole issue under Article 2.1.3 is whether the Navy's used ammunition caused concentrations of iron in certain areas of the coastal waters to exceed the specified maximum allowable concentration.

With respect to this question, we find nothing in the record to contradict the trial court's finding. Although it appears fairly clear that the concentrations of iron in some areas near the target range do exceed the Article 2.1.3(A) standard, Puerto Rico failed to establish that ordnance dropped by the Navy caused these excessive concentrations of iron. Thus, the district court correctly found no violation of Article 2.1.3.

Finally, we turn to the broadly phrased prohibition of Article 4 of the Water Quality Standards. Article 4.1.1 provides that "[n]o person shall cause or permit the pollution of the waters of Puerto Rico . . . ." Pollution is defined in Article 1 as

> [a]ltering the natural characteristics of a body of water so as to make it in any way harmful or noxious to human health, or to that of animals, or plants, or rendering it ill-smelling or impure or altering adversely its physical, chemical, microbiological or radioactive condition, in such a way as to interfere with enjoyment of life or property or violate the standards of purity established by this Regulation.

Puerto Rico argues that the district court failed to apply Article 4.1.1 as a "generic" prohibition distinct from the specific standards set forth in Article 2. We conclude, however, that

Article 4.1.1 does not constitute a "standard" as referred to in Puerto Rico's Water Pollution Control Act.

The statutory prohibition of pollution makes it "unlawful for any person . . . to throw, discharge, pour or dump . . . into the waters . . . any organic or inorganic matter capable of polluting" these waters "in such a manner as to place them out of the minimum standards of purity that the [Board on Environmental Quality] may establish . . . ." P.R. Laws Ann. tit. 24, § 595. Similarly, the statute defines pollution as "making [the waters] in any way noxious . . . all according to the permissible standards of purity . . . established as provided herein." P.R. Laws Ann tit. 24, § 591(i). This language evidences the legislature's judgment that the general prohibition of pollution is not enough; standards explicating what pollution is must be provided. The statute anticipates administrative specification of its broad proscription in the form of standards by which particular actions may be evaluated. But Article 4.1.1 merely rephrases the general statutory command; it offers no clarification of that language, nor, unlike Article 2, does it provide any additional guidance to those who must conform to the law. To accept 4.1.1 as a "standard" would render meaningless the statutory requirement that the regulations promulgated thereunder further define and clarify the general statutory proscription of pollution. Because Article 4.1.1 is not a standard as contemplated by the authorizing statute, we decline to give it effect separate from the actual standards of the Regulation.[18]

We affirm the district court's conclusion that the Navy has not violated the applicable Puerto Rico Water Quality Standards or 33 U.S.C. § 1323(a).

[18] The statutory provisions that empower the Board to adopt regulations, P.R. Laws Ann. tit. 12, § 1131(13) and tit. 24, §§ 598, 599, contain nothing contrary to this conclusion.

2. The Rivers and Harbors Act of 1899

The second phase of Puerto Rico's attempt to halt the Navy's dropping of ordnance into the coastal waters of Vieques rests primarily on an alleged violation of Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407. As a complement to that claim, Puerto Rico alleged that the Navy's sinking of the U.S.S. Killen in the Bahia Salinas del Sur violated Section 15 of the same act, 33 U.S.C. § 409. The district court ruled that neither § 13 nor § 15 give rise to a private cause of action for injunctive relief. 478 F. Supp. at 669-72. We affirm that decision with respect to § 13, but vacate the court's ruling with respect to § 15.

Section 13 makes it unlawful to throw, discharge or deposit "any refuse matter . . . into any navigable water of the United States . . ." without a permit from the Administrator of the Environmental Protection Agency. 33 U.S.C. §§ 407, 1342(a). The "comprehensive language" of this prohibition reflects a broad statutory purpose — the protection of navigation and the prevention of pollution. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 228-30 (1966). *See United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973). Under § 17 of the Act, it is the duty of the Department of Justice to "conduct the legal proceedings necessary to enforce the provisions" of § 13. 33 U.S.C. § 413. Although the Act expressly provides for criminal penalties only, *id.*, courts have recognized the federal government's implied authority to seek injunctive relief for a violation of § 13. *United States* v. *Stocco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). *See Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191 (1967); *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972). Puerto Rico argues that the broad purposes of § 13 also warrant the implication of a private cause of action for injunctive relief. We undertake an analysis of this claim mindful of the Supreme Court's recent adherence "to a stricter standard for the implication of private causes of action

. . . ."[19] *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979).

The touchstone of this inquiry is whether Congress intended that the statute be enforced by private parties. *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. at 568. That intent usually can best be ascertained by addressing four factors. *See Cort* v. *Ash*, 422 U.S. 66, 78 (1975). First it must be determined from the statutory language "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member." *Cannon* v. *University of Chicago*, 441 U.S. 677, 689 (1979). The duties imposed by § 13 benefit the public at large; nothing in the statutory language identifies any special class as the principal intended beneficiary.[20] Rather, if there is

[19] None of the courts of appeals that have previously considered this question were willing to imply a private cause of action under § 13. *See National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222 (3d Cir.), *cert. granted*, 49 U.S.L.W. 3281 (Oct. 14, 1980) (No. 79-1760); *Sierra Club* v. *Andrus*, 610 F.2d 581 (9th Cir. 1979) (dictum), *cert. granted sub nom., Kern County Water Agency* v. *Sierra Club*, 49 U.S.L.W. 3212 (Oct. 7, 1980) (No. 79-1502); *City of Evansville, Inc.* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979); *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972 (*qui tam* action); *Guthrie* v. *Alabama By-Products Co.*, 456 F.2d 1294 (5th Cir. 1972) (per curiam), *cert. denied*, 410 U.S. 946 (1973); *Bass Anglers Sportman's Society of America, Inc.* v. *Koppers Co.*, 447 F.2d 1304 (5th Cir. 1971) (per curiam). *See also Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275 (D. Conn. 1976), *aff'd mem. sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977); *Loveladies Property Owners Ass'n* v. *Raab*, 430 F. Supp. 276 (D.N.J. 1975), *aff'd mem.* 547 F.2d 1162 (3d Cir. 1976), *cert. denied*, 432 U.S. 906 (1977). Although the district court thought that the Fourth circuit may have recognized a private cause of action in *Rucker* v. *Willis*, 484 F.2d 158 (4th Cir. 1973), *River* v. *Richmond Metropolitan Authority*, 481 F.2d 1280 (4th Cir. 1973), and *Lauritzen* v. *Chesapeake Bay Bridge and Tunnel District*, 404 F.2d 1001 (4th Cir. 1968), we do not find those decisions to support that conclusion.

[20] That the Commonwealth of Puerto Rico is one of the plaintiffs in this case does not alter our conclusion. Section 13 "no more

a principal beneficiary of § 13's proscription, it is the "Government itself." *Wyandotte Transp. Co.* v. *United States*, 389 U.S. at 201. With a statute such as § 13, one which creates "duties on the part of persons for the benefit of the public at large," the Supreme Court "has been especially reluctant to imply causes of actions." *Cannon* v. *University of Chicago*, 441 U.S. at 691-92 n. 13.

The second factor requires an investigation of the legislative history. As the Supreme Court has recognized, however, little is likely to be learned from the legislative history of a statute which is silent on the question of private enforcement. *Id.* at 694. The debates and reports preceding § 13's enactment at most evidence that Congress had no intent with respect to this question. *See Touche Ross & Co.* v. *Redington*, 442 U.S. at 571.

The third factor is whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy . . . ."[21] 441 U.S. at 688-89 n.9. Section 17 of the Act provides that "[t]he Department of Justice shall conduct the legal proceedings necessary to enforce" § 13. 33 U.S.C. § 413.

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evidences an intent to 'especially' benefit a class of [state governments] or their agents than a class of private parties . . . ." *City of Evansville, Ind.* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1012 n.7 (7th Cir.), *cert. denied*, 444 U.S. 1025 (1979).

[21] Later in the *Cannon* opinion the court rephrased this factor as a question of whether "a private remedy . . . would frustrate the underlying purpose of the legislative scheme" and observed that "when that remedy is necessary or at least helpful to the accomplishment of the statutory scheme, the Court is decidedly receptive to its implication . . . ." 441 U.S. at 703. To the extent that this rephrasing weighs more favorably towards implication of a private cause of action, we think it reflects the Court's previous conclusion that the statute at issue was intended to benefit a special class. The potential remedial advantages of an implied cause of action no longer hold the sway they once did, *Touche Ross & Co.* v. *Redington*, 442 U.S. at 578, even when the statute at issue does benefit a special class, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 15-16, 19-20, 23-24.

The only role expressly created for private persons in the enforcement scheme is as informants; section 17 provides for the payment of one-half of a levied fine "to the person or person giving information which shall lead to conviction." *Id.* § 411. In one respect, a private cause of action is clearly consistent with the legislative scheme. It would positively augment the government's enforcement efforts, thus better effectuating the ultimate objectives of § 13. But notwithstanding the remedial advantages to be gained from such implication, the language of these provisions establishes that Congress vested in the federal government the primary responsibility for enforcement.[22] To the extent that this decision involved factors other

[22]Puerto Rico puts great store in the fact that the Department of Justice is obligated to represent federal agencies charged with a violation of the Act and thus is "in no position to enforce the Act" against those same federal agencies. *Natural Resources Defense Council, Inc.* v. *Grant*, 355 F. Supp. 280, 290 (E.D.N.C. 1973). The Commonwealth maintains that private parties must be allowed to vindicate the public's interest in environmental protection. *Id. See People of the State of Illinois ex rel Scott* v. *Hoffman*, 425 F. Supp. 71 (S.D. Ill. 1977). *See also Sierra Club* v. *Andrus*, 610 F.2d 581, 590-91 (9th Cir. 1979), *cert. granted*, 49 U.S.L.W. 3212 (Oct. 7, 1980) (No. 79-1502). But whether or not this situation presents an insuperable conflict, our responsibility is to ascertain Congress' intent, not to improve upon its enforcement scheme. *Touche Ross & Co.* v. *Redington*, 442 U.S. at 578. Moreover, the absence of an implied private cause of action under § 13 does not mean that federal agencies are effectively free to ignore their responsibilities with respect to the control of water pollution. Section 313 of the Federal Water Pollution Control Act Amendments subjects every federal agency to "all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution . . . ." 33 U.S.C. § 1332(a). Under § 505 of the same Act, *id.* § 1365, Puerto Rico may sue to enforce that obligation, as it has done in this case. The similarity in purpose between the Rivers and Harbors Act and the Federal Water Pollution Control Act is reflected in the fact that the permit requirement imposed by § 13 is now implemented by the Administrator of the EPA under § 402 of the Federal Water Pollution Control Act. *See* 33 U.S.C. § 1342(a)(1)(2). Because no issue is presented here in which the substantive requirements of § 13 might differ from those of the Federal Water Pollution Control Act, we need express no view on the availability of a right of private enforcement against federal defendants in a situation in which they did.

than the protection of navigation and the prevention of pollution, implication of a private cause of action could very well frustrate Congress' intent.[23] *See Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d at 89.

Finally, we must consider "whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States." *Cannon* v. *University of Chicago*, 441 U.S. at 709. The federal interest in navigation and the control of pollution cannot be doubted. Congress' power under the Commerce clause gives that body virtually plenary authority over the navigable waters of the United States. *See, e.g., Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713 (1865); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Since the enactment of the Rivers and Harbors Act in 1899, Congress has expanded federal efforts to control the pollution of navigable waters with the adoption of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251-1376. The enactment in 1969 of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4369, underscores the federal commitment to combat pollution. We perceive no federalism-comity problems militating against the implication of a private cause of action under § 13.

Of the four factors we have analyzed to ascertain Congress' intent, only the last clearly favors implication of a private cause of action. Although we recognize that private enforce-

[23] Section 17 requires the Department of Justice "to vigorously prosecute all offenders . . . when requested to do so by the Secretary of the Army or by any of the officials hereinafter designated . . . ." 33 U.S.C. § 413. It vests in the appropriate administrative officials, if not also the Attorney General, the discretion to decide whether § 13 should be enforced in a particular case. As a provision for prosecutorial discretion, it reflects a legislative decision to husband the enforcement resources of the federal government, including those of the judiciary. The government's decision not to enforce § 13 against a particular party, perhaps in anticipation of an informal resolution of the matter, could be frustrated by a private party armed with an implied cause of action.

ment of § 13 might be conducive to the protection of navigation and the control of pollution, "[t]he ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme . . . ." *Touche Ross & Co.* v. *Redington*, 442 U.S. at 578. What evidence there is does not warrant a conclusion that Congress intended to create a private cause of action under § 13.[24]

Section 15 of the Rivers and Harbors Act makes it unlawful "to voluntarily, or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels . . . ." 33 U.S.C. § 409. Puerto Rico maintains that the Navy's intentional sinking of a target ship, the U.S.S. Killen, in the Bahia Salinas del Sur, violated this prohibition. We conclude that Puerto Rico is without standing to assert this claim.

"The essence of the standing inquiry is whether" the plaintiff has alleged "a 'distinct and palpable injury' . . . 'fairly traceable' . . . to the challenged conduct." *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 73 (1978) (citations omitted). Puerto Rico failed to allege that the sinking of the U.S.S. Killen resulted in any form of harm to the island or its inhabitants. Nor does the relief requested — an injunction against the Navy's training activities on Vieques — implicitly suggest the harm which Puerto Rico might have alleged. An injunction against current Navy activities hardly would remedy any injury to the environment or navigation caused by a sunken vessel. Removal of the ship would be the appropriate

[24] Two of the decisions relied upon by Puerto Rico rest, in principle if not by name, on an application of § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702. *See Citizens Committee for Hudson Valley* v. *Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); *People of the State of Ill. ex rel Scott* v. *Hoffman*, 425 F. Supp. 71 (S.D. Ill. 1977). That statute creates a right to judicial review for persons injured by "agency action," the definition of which does not encompass the Navy's dropping of ordnance into the coastal waters of Vieques. *See* 5 U.S.C. § 551(13). *See* pp. 18-19, *supra*.

remedy for harm resulting from the ship's presence, but Puerto Rico did not request that relief.[25] The failure to allege a distinct and palpable injury renders Puerto Rico's claim under § 15 nonjusticiable. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). Thus, we vacate the district court's decision with respect to this claim, and remand with instructions to dismiss for lack of jurisdiction.[26]

Restrictions on Fishing

"In the interest of the national defense, and for the better protection of life and property," section 1 of the Army Appropriation Act of 1918 authorizes the Secretary of the Army "to prescribe such regulations as he may deem best for the use and navigation of any portion or area of the navigable waters . . . under the jurisdiction of the United States endangered or likely to be endangered by Artillery fire in target practice or otherwise . . . ." 33 U.S.C. § 3. The sole express restraint imposed by the statute on the Secretary's power provides "that the authority conferred shall be so exercised as not unreasonably to interfere with or restrict the food fishing industry . . . ." *Id.* Pursuant to this authority, the Secretary has promulgated danger zone regulations individually tailored to the particular area of water in question. *See* 33 C.F.R. § 204.

[25] Puerto Rico correctly argues that a violation of § 15 can be established without proof that navigation has been actually obstructed by the voluntary sinking of a vessel. This does not, however, obviate the jurisdictional requirement that a private party seeking relief under § 15 allege some injury in fact to itself.

[26] Given our disposition of this claim, we need not decide whether a private cause of action for injunctive relief should be implied from § 15. Nonetheless, we think it appropriate to observe that our analysis of that issue with respect to § 13 is equally applicable to § 15.

In 1974 the Secretary of the Army promulgated the following regulation:

> Carribean Sea and Vieques Sound in vicinity of Eastern Vieques, bombing and gunnery target area.
>
> (a) *The Danger Zone.* From Punta Conejo on the south coast of Vieques at latitude 18°06'30", longitude 65°22'33"; thence to latitude 18°03'00", longitude 65°21'00"; thence to latitude 18°03'00", longitude 65°15'30"; thence to latitude 18°11"30", longitude 65°14'30"; thence to latitude 18°12'00", longitude 65°20'00"; and thence to Cabellos Colorados on the north coast of Vieques at latitude 18°09'49", longitude 65°23'27".
>
> (b) *Regulations.* (1) It will be open to navigation at all times except when firing is being conducted. At such times no surface vessels, except those patrolling the area, shall enter or remain within the danger area. Prior to conducting each firing or dropping or ordnance the danger area will be patrolled to insure that no watercraft are within the danger area. Any watercraft in the vicinity will be warned that practice firing is about to take place and advised to vacate the area.
>
> (2) The regulations will be enforced by the Commander, Caribbean Sea Frontier, San Juan, P.R., and such agencies as he may designate.

33 C.F.R. § 204.234 (1979).

At trial, Puerto Rico contended that the Navy's use of this area for bombing and gunnery practice unreasonably interfered with the island's food fishing industry, in violation of 33 U.S.C. § 3. In rejecting this claim, the district court ruled that:

> The Plaintiffs herein have presented absolutely no evidence that Defendant Navy has impermissibly or unilaterally expanded the areas authorized as a danger zone (33 C.F.R § 204.234) . . . The navigable waters contiguous to Defendant Navy's weapons training range at

> Vieques are navigable waters of the United States, and they have been restricted in exactly the manner intended by law and regulations.

478 F. Supp. at 701.

On appeal Puerto Rico argues that the district court failed to consider the needs of Vieques' fishing industry, in disregard of the statutory requirement that the danger zone regulation not unreasonably interfere with or restrict the food fishing industry. We conclude, however, that the only question properly before the court was whether the Navy had complied with the danger zone regulation.

As is apparent from the statutory language, the provision against unreasonable interference with the food fishing industry applies to the Secretary of the Army's exercise of his authority to prescribe and regulate. Assuming that the Navy has acted in accordance with 33 C.F.R. § 204.234, to decide whether the Navy has unreasonably interfered with fishing would necessarily draw into question the validity of the regulation under the enabling statute, 33 U.S.C. § 3. Yet Puerto Rico has not named the Secretary of the Army as a defendant in this case. Thus, if we, or the district court, were to define a standard of reasonableness for 33 U.S.C. § 3 and apply it to the facts of this case, we would do so in the absence of the agency responsible for the administrative determination that 33 C.F.R. § 204.234 comports with the statutory command. None of the record relevant to the formulation of this regulation is part of the record in this case.[27] Nor, of course, has the Secretary had the opportunity, at trial or on appeal, to defend the propriety of the regulation.

Had the district court ruled on whether 33 C.F.R. § 204.234 unreasonably interferes with the food fishing industry, we

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[27] The current regulation, 36 C.F.R. § 204.234, was promulgated only after the Corps of Engineers had provided public notice of the proposed regulation and an opportunity for comments. 39 Fed. Reg. 13889, 27133 (1974).

would vacate that ruling for the reasons stated above.[28] We conclude, however, that the court's decision is only a determination that the Navy has complied with 33 C.F.R. § 204.234. We need offer no opinion on this because Puerto Rico has not challenged it on appeal.

Noise Pollution

In its complaint, Puerto Rico contended that the Navy's training activities generate "shock waves and excessive noise that unreasonably interfere with the health and welfare of residents of Vieques . . . ." It sought to enjoin these activities as a violation of the Commonwealth's criminal nuisance statute,[29] P.R. Laws Ann. tit. 33, § 1365,[30] alleged to be applicable to the Navy's operations through Section 4 of the

[28] When necessary to protect the interests of an absent party, a court of appeals should consider *sua sponte* whether a claim should be dismissed for failure to join an indispensable party. *See Provident Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 111 (1968); *NLRB* v. *Doug Neal Management Co.*, 620 F.2d 1133, 1139 (6th Cir. 1980); *Kimball* v. *Florida*, 537 F.2d 1305, 1307 (5th Cir. 1976).

[29] Although Puerto Rico does not seek to impose criminal penalties on the Navy, it chose to base its case on its criminal nuisance law rather than its very similar civil nuisance statute, P.R. Laws Ann Tit. 32, § 2761, perhaps because the latter does not expressly refer to public nuisances. *See* note 40 *infra*. The choice of statute relied upon does not affect our analysis or conclusion.

[30] P.R. Laws Ann. tit. 33, § 1365 provides in pertinent part:

> Anything which is injurious to health, or is indecent or offensive to the senses, or is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal or basin, or any public park, square, street or highway is a public nuisance[.]

Noise Control Act, 42 U.S.C. § 4903(b)(the Act).[31] The district court denied the request for an injunction, ruling that the Act does not apply because the nuisance statute does not establish noise control "requirements" as that term is used in Section 4. 478 F. Supp. at 675. Despite this ruling, the court proceeded to consider the evidence and determined that the noise attributable to the Navy's activities does not interfere with the quality of life on Vieques. *Id.* at 680. We conclude that the district court was without jurisdiction to entertain Puerto Rico's claim.

A careful reading of the Noise Control Act's citizen suit provision, section 12, 42 U.S.C. § 4911, discloses that Congress expressly created a private cause of action only with respect to the enforcement of federal noise control requirements. Subsection (a) permits "any person," including a state, to bring suit in federal district court against any federal agency that has violated a "noise control requirement." That term is defined in subsection (f) by reference to other sections of the Act, all of which concern the granting of regulatory powers to the Administrator of the EPA or the Secretary of the Treasury, and the enforcement of regulations promulgated thereunder. Section 12 has no provision for citizens' suits to enforce a federal agency's duty to comply with state and local requirements regarding the control and abatement of environmental noise. Thus, Puerto Rico's claim, premised on a violation of state law, cannot be maintained under § 12 of the Act, 42 U.S.C. § 4911.

[31] 42 U.S.C. § 4903(b) provides in pertinent part:

> (b) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government —
>
> (1) having jurisdiction over any property or facility, or
>
> (2) engaged in any activity resulting, or which may result, in the emission of noise,
>
> shall comply with Federal, State, interstate and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements.

In the absence of an alternative basis in federal law, the unavailability of § 12 warrants dismissal of this state law claim for lack of jurisdiction because it is otherwise barred by sovereign immunity. *See United States* v. *Testan*, 424 U.S. 392 (1976); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). We recognize, however, that § 4, to the extent it subjects every federal agency to state noise control requirements, arguably permits suit against an officer of a federal agency for a violation of those requirements.[32] If § 4 requires the Navy to comply with Puerto Rico's criminal nuisance statute, this responsibility may be enforceable by an implied cause of action under § 4.[33] We reach the latter ques-

[32] The doctrine of sovereign immunity bars suit against a federal agency *eo nomine* in the absence of an express congressional waiver. *See United States* v. *Testan*, 424 U.S. 392 (1976); *United States* v. *King*, 395 U.S. 1 (1969); *Commonwealth of Massachusetts* v. *United States Veterans Administration*, 541 F.2d 119 (1st Cir. 1976). In contrast, a federal officer is subject to suit despite the lack of express legislative waiver if that officer has acted outside the legal limitations on his authority. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). The federal mandate provided in 42 U.S.C. § 4903(b) constitutes such a limitation. *See Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190, 1214 (4th Cir. 1976), *cert. denied*, *431 U.S. 924 (1977)*.

[33] A determination of whether Puerto Rico's nuisance statute constitutes a requirement under § 4 will also determine whether the district court had subject matter jurisdiction over this claim. This question of jurisdiction should be resolved prior to a decision of whether Puerto Rico has stated a claim upon which relief can be granted. With respect to the latter issue, we observe only that implication of a cause of action is plausible. Although no court has previously decided whether § 12 exclusively defines the available causes of action under the Act, several courts of appeals have considered, and disagreed, about the implication of a cause of action in an analogous statutory context. Both the Clean Air Act and the Federal Water Pollution Control Act (FWPCA) contain citizen suit provisions quite similar to § 12. *See* 42 U.S.C. § 7604; 33 U.S.C. § 1365. The Courts of Appeals for the Second, Third and District of Columbia Circuits have held that 33 U.S.C. § 1365 does not preclude, *inter alia*, implication of a cause of action under different substantive provisions of the FWPCA. *National Sea Clammers Ass'n*

tion, however, only if we first determine that Puerto Rico's nuisance statute establishes "requirements" that would trigger the application of § 4.

The key issue, therefore, is the definition of "requirements." As used in § 4 of the Noise Control Act, the term stands unexplicated by Congress or the courts. But the model from which § 4 was drawn,[34] section 118 of the Clean Air Act (currently codified at 42 U.S.C. § 7604), has received intense scrutiny. Judicial interpretation of the term "requirement" as used in § 118, and Congress' response to that interpretation, sheds considerable light on the definition of "requirements" as used in § 4.[35]

Section 118 of the Clean Air Act underwent its most important dissection at the hands of the Supreme Court in *Hancock* v. *Train*, 426 U.S. 163 (1976).[36] Two steps in the Court's

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v. *City of New York*, 616 F.2d 1222, 1228-31 (3d Cir.), *cert. granted*, 49 U.S.L.W. 3281 (Oct. 14, 1980) (No. 79-1760); *Natural Resources Defense Council, Inc.* v. *Callaway*, 524 F.2d 79, 83-84 (2d Cir. 1975); *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 698-703 (D.C. Cir. 1974). The Seventh Circuit has rejected this conclusion with respect to the Clean Air Act. *City of Highland Park* v. *Train*, 519 F.2d 681, 690-93 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976). In a case involving the FWPCA, this court expressly reserved decision of the question. *Commonwealth of Massachusetts* v. *United States Veterans Administration*, 541 F.2d 119, 122-23 & n.4 (1st Cir. 1976).

[34] Although the legislative history of § 4 does not identify § 118 as the prototype for § 4, there is a close similarity in the language of the two provisions. And the legislative history does establish expressly the overall importance of the Clean Air Act as a model for the drafters of the Noise Control Act. *See* S. Rep. No. 1160, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4658, 4661, 4667.

[35] Section 313 of the Federal Water Pollution Control Act, 33 U.S.C. § 1323, also tracks the language of § 118 and has been similarly construed. *See Environmental Protection Agency* v. *California ex rel State Water Resources Board*, 426 U.S. 200 (1976).

[36] Congress legislatively reversed the actual holding of *Hancock* with the enactment of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. *See* H.R. 6161, 95th Cong., 1st Sess. 12,

analysis are particularly apposite to the question before us. First, the Court's reading of § 118's legislative history disclosed that the various preliminary drafts and the committee reports used "requirements" interchangeably with "emission requirements" and "emission standards." *Id.* at 188-89 & n.2. Congress apparently understood "requirements" to refer to standards specifying the permissible emission levels for various point sources and pollutants.[37] Though hardly conclusive, the court's observation presents some evidence of the legislative use of the term in the pollution control context, and particularly in the drafting of the prototype for § 4.

The second step in *Hancock* pertinent to our inquiry rested on the Court's recognition of the close relationship between § 118 and § 304, the citizen suit provision of the Clean Air Act. 42 U.S.C. § 7604. "§ 118 establishes the duty of federal installations to comply with state 'requirements,' and § 304 provides the means of enforcing that duty in federal court." 426 at 196. Section 304 restricts the area subject to enforcement by

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reprinted in [1977] U.S. Code Cong. & Ad. News 1089-90. Neither the amendments nor the committee reports undermine that part of the Court's reasoning upon which we rely. The companion case to *Hancock*, *Environmental Protection Agency* v. *California ex rel State Water Resources Board*, 426 U.S. 200 (1976), suffered like treatement with the enactment of the Clean Water Act of 1977, Pub. L. No. 95-217, § 60, 91 Stat. 1597, 1598. *See* S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* [1977] U.S. Code Cong. & Ad. News 4392. The apparent purpose of these amendments was to ensure the enforceability of the applicable substantive control requirements. We find no evidence that the amendments were intended to expand the category of applicable substantive requirements.

[37] The Senate Committe report that accompanied the final draft of the Noise Control Act offers some evidence of a similar understanding with respect to the control of noise. *See* S. Rep. No. 1160, 92nd cong., 2d Sess., *reprinted in* [1972] U.S. Cong. & Ad. News 4655. In particular, the Committee concluded that the federal noise control requirements that would be enforceable under § 12 should be "technologically-based standards" rather than the more open ended standard of the "public health and welfare." *Id.* at 4659.

suit to emission limitations or standards, standards of performance, and compliance schedules. The Court concluded that the scope of the § 304 enforcement power defined the scope of the § 118 duties because "it seems most unlikely that in providing that a State might bring suit in district court to enforce the duties of federal installations under § 118, the Congress would not make all those duties enforceable . . . ." *Id.* at 197.

We recognize a similar relationship between the "requirements" of § 4 and those of § 12 of the Noise Control Act. The primary objective in our attempt to clarify the term "requirements" is to ascertain Congress' intent and § 12 contains the sole legislative definition of that term in the Act. More importantly, that definition occurs in the provision for private enforcement of the Act. Section 12, unlike § 304 of the Clean Air Act, does not allow for suit by a state to enforce a state pollution control requirement. Thus, unlike the scheme of the Clean Air Act, § 12 does not define specifically which state requirements are incorporated in § 4. But it does permit a state to bring suit against a federal agency for violation of certain federal requirements. Considered together, the federal requirements enforceable under § 12 are the best evidence of the type of noise control requirement that Congress intended to be enforceable by suit against a federal agency.

Section 12 authorizes suit by a state to enforce "any noise control requirement," as defined in subsection (f). 42 U.S.C. § 4911(a). That definition in turn refers to several provisions of the Act which provide for (a) standards, rules or regulations controlling the noise emissions of motor carriers, railroads and aircraft, *id.* §§ 4916, 4917; 49 U.S.C. § 1431, (b) labelling regulations, 42 U.S.C. § 4907, and (c) noise emission standards applicable to specified domestic and imported products, *id.* §§ 4905, 4908. From these various provisions of the Act we can abstract the type of legal control contemplated by the statutory term "requirement." The appointed agency establishes a standard that sets forth, specifically, the

allowable intensity, duration and character of sounds[38] from a certain type of source, and then measures the noise emissions of such sources against that standard. *See* 40 C.F.R. Parts 201-205. This type of control relies on relatively precise standards capable of uniform application to similar sources of sound. We conclude that when Congress used the term "requirements" in the Noise Control Act, it was in reference to regulations of this type.[39]

The final question is whether Puerto Rico's criminal nuisance statute embodies the kind of "requirements" with which the Navy must comply pursuant to § 4. The statute broadly proscribes as a public nuisance:

> Anything which is injurious to health, or is indecent or offensive to the senses, or is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons[.]

P.R. Laws Ann. tit. 33, § 1365. Although the criminal nuisance statute has not yet been subjected to judicial scrutiny, the Supreme Court of Puerto Rico has interpreted the simi-

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[38] *See* 42 U.S.C. § 4902(11) (definition of environmental noise).

[39] Puerto Rico relies on a statement in the Senate Committee's report that the Noise Control Act does not affect the authority of the states "to reach or maintain levels of environmental noise ... through [*inter alia*] nuisance laws." S. Rep. 1160, 92d Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad News 4660. But this statement is not part of the Committee's commentary on §§ 4 or 12. Rather, it addresses to what extent § 6 (42 U.S.C. § 4905), and regulations promulgated thereunder, would preempt state law as applied to products in the hands of the user. *Id.* Section 6 authorizes the adoption of noise emission standards to be applied to products at the manufacturing stage. Establishing that state law is not preempted in this particular context does not answer the distinct question of to what extent Congress intended to waive the federal government's sovereign immunity. Neither § 6 nor the Committee's commentary on § 6 addresses this question.

larly worded civil nuisance statute.[40] It perceived as the essential purpose of that statute the maintenance of a balance between the defendant's right to the free use of his property and the rights of others to the comfortable enjoyment of life or property: To strike that balance requires a case by case determination of the reasonableness of a defendant's activity. *See Casiano Sales* v. *Lozada Torres*, 91 P.R.R. 473, 477-78, 482 (1964); *Arcelay* v. *Sanchez*, 77 P.R.R. 782, 790 (1955). This form of decisionmaking, peculiarly sensitive to the facts of a single case, permits no role for the type of specific, uniform standard characteristic of "requirements," as described above. Thus, we conclude that Puerto Rico's criminal nuisance statute falls outside § 4's incorporation of "State ... requirements respecting control and abatement of environmental noise ...." 42 U.S.C. § 4903(b).

Our conclusion renders unnecessary a decision as to whether a private cause of action should be implied to enforce § 4's mandate. We see no other tenable ground upon which the district court had jurisdiction over the state nuisance claim. Therefore, we vacate the district court's decision and remand for dismissal for lack of jurisdiction.

Endangered or Threatened Species

Of the various animal species living in and around Vieques, four have been designated by the United States Fish and Wildlife Service as "endangered"[41] (of which three are in issue) and two others have been determined to be threat-

[40] P.R. Laws Ann. tit. 32, § 2761 states: "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance ...."

[41] "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). The endangered species on Vieques include the brown pelican, the manatee, the leatherback turtle and the hawksbill turtle. 50 C.F.R. § 17.11. The effects of the Navy's activities on the manatee are not at issue in this appeal.

ened."[42] in accordance with the criteria of § 4 of the Endangered Species Act (the Act), as amended, 16 U.S.C. § 1533. *See* 50 C.F.R § 17.11. The Commonwealth alleged that the Navy's training operations directly imperil these species and cause significant adverse changes in their habitats, contrary to the requirements of § 7 of the Act, *id.* § 1536, and the prohibition of § 9, *id.* § 1538. The district court found that the Navy's activities do not adversely affect the five species and in fact inadvertently create a refuge for these species, protecting them from local hunters. On appeal, the Commonwealth challenges the court's findings and urges that the district court misconstrued the requirements of § 7(a). Because we conclude that the Navy has not fulfilled its obligations under § 7(a)(2), we vacate the district court's decision and remand for further consideration.

Section 4 of the Endangered Species Act directs the Secretary of the Interior and the Secretary of Commerce to determine which, if any, species are endangered or threatened, and to identify the critical habitat of the species so designated. 16 U.S.C. § 1533. As part of the Act's comprehensive design to protect such designated species, § 7(a)(2) provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species . . . .

[42] "The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). The threatened species on Vieques include the loggerhead turtle and the green turtle. 50 C.F.R § 17.11.

Id. § 1536(a)(2).[43] Regulations promulgated jointly by the United States Fish and Wildlife Service and the National Marine Fisheries Service define the duty of a federal agency under § 7 to consult with those Services. 50 C.F.R § 402.04. Every agency is required to review its programs and all other activities to determine whether any of its actions possibly affect endangered or threatened species or their habitats. *Id.* § 402.04(a)(1). Once an agency has discovered that some action for which it is responsible crosses the low threshold of possible effect, it must consult formally with the Fish and Wildlife Service or the Marine Fisheries Service. *Id.* § 402.04(a)(3). *See id.* § 402.01. Formal consultation requires that the agency request a "biological opinion" from the appropriate Service, and supplement the request with the available pertinent information. *Id.* In response, the Service issues a written statement that sets forth (1) its opinion on whether the agency is in violation of § 7(a)(2), (2) the information upon which it based its opinion, and (3) "recommendations for modifications in the identified activity program which would enhance the conservation and protection of a listed species or its critical habitat." *Id.* § 402.04(e)(4). *See* 16 U.S.C. § 1536(b).[44]

[43] "Secretary," as used in § 7 and the other provisions of the Act, refers to the Secretary of Interior or the Secretary of Commerce, depending on the particular species at issue. Although these two officials formally share the responsibilities created by the Act, their duties are actually performed by two departmental agencies — the United States Fish and Wildlife Service (Interior) and the National Marine Fisheries Service (Commerce). For the remainder of this opinion, we refer to the Service rather than the Secretary.

[44] Although the regulations, promulgated on January 4, 1978, made optional the offering of recommendations, Congress has since mandated inclusion of such recommendations in a biological opinion. Pub. L. No. 95-632, 92 Stat. 3751 (1978). *See* H. Conf. Rep. 1804, 95th Cong., 2d Sess. 18, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9486; H.R. Rep. No. 1625, 95th Cong., 2d Sess. 11-12, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9461-2.

As of the date that the district court entered judgment, the Navy had failed to obtain a biological opinion with respect to the impact of its Vieques operations on the five listed species. By ignoring the statutory mandate, the Navy has sidestepped the administrative process that Congress expected would resolve many of the conflicts between agency action and the requirements of § 7.[45] If the Navy had sought consultation within a reasonable period following the adoption of the Act, the burden of litigating Puerto Rico's claim might have been avoided. The Navy's nonfeasance also has denied the district court potentially valuable evidence. In considering the 1979 amendments to the Act, Congress found, with approval, that courts have accorded substantial weight to a sound biological opinion in determining an agency's compliance with 7(a)(2).[46] Finally, biological opinions not only address possible violations of 7(a)(2), but more generally recommend conservation measures designed to mitigate or remove all adverse effects on an endangered or threatened species. These recommendations pertain to the statutory responsibility of agencies to carry out "programs for the conservation of endangered species or threatened species . . . ." 16 U.S.C. § 1536(a)(1).[47] Although the district court apparently found that the refugee effect

[45] *See* H.R. Rep. No. 167, 96th Cong., 1st Sess. 5, *reprinted in* [1979] U.S. Code Cong. & Ad. News 4765; H. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9486; H.R. Rep. No. 1625, 95th Cong., 2d Sess. 11, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9461.

[46] H. Conf. Rep. No. 697, 96th Cong., 1st Sess 12, *reprinted in* [1979] U.S. Code Cong. & Ad. News 4780. *Compare National Wildlife Federation* v. *Coleman*, 529 F.2d 359, 372-75 (5th Cir. *cert. denied sub nom. Boteler* v. *National Wildlife Federation*, 429 U.S. 979 (1976) *with Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1301-05 (8th Cir. 1976). *Cf. North Slope Borough* v. *Andrus*, 486 F. Supp. 332, 351-54 (D.D.C.), *vacated on other grounds sub nom. National Wildlife Federation* v. *Andrus*, No. 80-1148, et al. (D.C. Cir. Sept., 1980) (evaluation of a biological opinion in light of the statutory purposes).

[47] The statute defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any

created by the Navy's activities satisfied this obligation, *see* 478 F. Supp. at 689-90, a biological opinion could alter this conclusion.

Since entry of judgment, the Navy has received a biological opinion from the United States Fish and Wildlife Service. But that opinion is not part of the record and we therefore disregard it in our decision of this case. *See Construction Aggregates Corp.* v. *Rivera de Vicenty*, 573 F.2d 86, 95 n.7 (1st Cir. 1978); *Rosen* v. *Lawson-Hemphill, Inc.*, 549 F.2d 205, 206 (1st Cir. 1976). To do otherwise would be contrary to Federal Rule of Appellate Procedure 10(a) and would preclude the district court from considering evidence that both this court, and Congress, deem essential to a complete decision of the issue. Moreover, the Commonwealth should have the opportunity to challenge the adequacy of the biological opinion, both in terms of its factual basis and its recommendations.

The Commonwealth also challenges the Navy's training activities under § 9 of the Endangered Species Act, 16 U.S.C. § 1538. Section 9 prohibits any person, including an officer or department of the federal government, from taking an endangered species. *Id.* § 1538(a)(1)(B).[48] Taking is defined by the statute as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* 1532(19). As interpreted by the Fish and Wildlife Service, harassment includes a significant disruption

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endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

[48] Section 9 provides in pertinent part:

> (a)(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to —
>
> (B) take any such species within the United States or the territorial sea of the United States[.]

16 U.S.C. § 1538(a)(1)(B).

of normal behavioral patterns likely to cause injury, and harm includes significant disruption of essential behavioral patterns or environmental degradation. 50 C.F.R § 17.3. So far as can be discovered from the briefs and the record, we understand Puerto Rico's claim under § 9 to rest on the proscription of harassment and harm as those terms are defined by the Fish and Wildlife Service. Because of the close similarity between this particular prohibition and the requirements of § 7(a), we conclude that the § 9 claim should be remanded along with the § 7 claim. The district court should have the benefit of the biological opinion in determining whether the Navy's operations respect the proscription of § 9.

We vacate the district court's decision with respect to the Endangered Species Act and remand for further consideration in light of this opinion.

Preservation of Historic and Prehistoric Sites

Puerto Rico alleged in its complaint that the Navy's complete failure to identify and protect all the sites on Navy property that are of historical or archeological significance violated § 106 of the National Historic Preservation Act (16 U.S.C. § 470f), Ececutive Order 11593 and regulations issued by the Advisory Council on Historic Preservation.[49] After Puerto Rico had filed its complaint, the Navy undertook a combined sampling and predictive survey of the island which disclosed the existence of a number of sites on Navy property at least some of which may be eligible for inclusion in the National Register of Historic Places. The district court concluded that this survey satisfied the Navy's obligation to locate sites. 478 F. Supp. at 693. The court also ruled, however, that the Navy had violated the Executive Order by failing either to nominate to the Secretary of the Interior those newly dis-

[49] The Advisory Council on Historic Preservation is an independent agency, 16 U.S.C. § 470i, authorized to "promulgate such rules and regulations as it deems necessary to govern the implementation of section 470f . . ." *Id.* § 470s.

covered sites that may be eligible for listing in the Register or to seek the Secretary's opinion on their eligibility. *Id.* at 694. The court ordered the Navy to correct this omission and to safeguard the potentially eligible sites. *Id.* at 708.

On appeal, neither party challenges the district court's ruling with respect to determining the eligibility of known sites. But the Commonwealth does question the court's decision on the adequacy of the Navy's survey. According to the Commonwealth, testimony by the Navy's own experts establishes that the survey did not locate all the sites on the island, as is required by the Act, the Executive Order, and the Advisory Council's regulations. We agree.

Section 106 of the National Historic Preservation Act, as amended, imposes a basic responsibility on "the head of any federal agency" to "take into account the effect" of a proposed federal undertaking "on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. With the promulgation of Executive Order 11593, the President substantially expanded the mandate of § 106. The order requires that every federal agency

> (a) no later than July 1, 1973, with the advice of the Secretary of the Interior, and in cooperation with the liaison officer for historic preservation for the State or territory involved, locate, inventory and nominate to the Secretary of the Interior all sites, buildings, districts and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places.
>
> (b) exercise caution during the interim period until inventories and evaluations required by subsection (a) are completed to assure that any federally owned property that might qualify for nomination is not inadvertently transferred, sold, demolished or substantially altered.

36 Fed. Reg. 8921 (May 13, 1971), *reprinted in* 16 U.S.C. § 470 at 28. The express obligation imposed by the Executive

Order to locate "all" possibly eligible sites has been further defined within the past two years by the Advisory Council on Historic Preservation. *See* 36 C.F.R. § 800.4. The Council's regulations reaffirm "the responsibility of each Federal agency to identify or cause to be identified any National Register or eligible property ... that may be affected by the undertaking." *Id.* § 800.4(a). Moreover, the regulations contemplate an active consultive role for the "State Historic Preservation Officer" from the inception of a federal agency's efforts to fulfill its historic preservation responsibilities. *See id.* § 800.4. Thus, the first step in satisfying an agency's obligations under the Executive Order and the regulations is to locate, in consultation with the state's officer for historic preservation, "all" and "any" sites that may be eligible for inclusion in the National Register.[50] The sole question is whether the Navy has satisfactorily completed that first step.

The Navy's survey of Vieques, which in design encompassed the entire island, relied on a combination of three methods. The island was divided into 665 squares, each of which measured 500 by 500 meters. Ten percent of the squares were selected randomly as samples. Another group of samples, approximately ten percent of the squares, were selected by ran-

[50] Although by its terms § 106 applies only to proposed undertakings, the Navy does not challenge the validity of Executive Order 11593 or the Council's regulations as applied to current undertakings. There is good reason for their acquiescence. Executive Order 11593 expressly derives its statutory authority not only from the National Historic Preservation Act but also, *inter alia*, the National Environmental Policy Act, 42 U.S.C. §§ 4331 et. seq. Although NEPA refers only to proposed major federal actions, it has been construed to apply to ongoing federal activities. *Jones* v. *Lynn*, 477 F.2d 885, 889 (1st Cir. 1973); *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1176-81 (6th Cir. 1972); *see TVA* v. *Hill*, 437 U.S. 153, 188 n.34 (1978). More generally, the reasoning underlying this construction of NEPA supports a similar conclusion with respect to the scope of § 106 of the National Historic Preservation Act. *See Jones* v. *Lynn*, 477 F.2d at 889; *Environmental Defense Fund* v. *TVA*, 468 F.2d at 1176-81.

domly choosing one square and then selecting every tenth square after the first one chosen. The third method began with a search by the Navy's archeologist of the available literature and interviews with local residents having special knowledge of the island's history. On the basis of this inquiry, and his prior experience, he directed the survey team to the squares that he predicted were most likely to contain archeological remains. The squares that were selected by these three methods were then walked by members of the survey team at intervals of 100 meters. Each square was traversed in a criss-cross fashion, the surveyor walking several times along the line of each 100 meter point from east to west and then from north to south.

The Navy defends its survey as a responsible and reasonable good faith effort to locate the archaeological sites that still exist on Vieques. According to the Navy, when it had completed the survey it had satisfied the duty imposed by the Executive order and the regulations to locate all sites that may be eligible for inclusion in the National Register. But the testimony of the archeologist responsible for the design of the Navy's survey belies this contention. He testified that there remain to be located a substantial number of sites of possible archeological value. Thus, he characterized the survey as preliminary and acknowledged the need for additional work. Given the likelihood of further discoveries, the Navy's position flies in the face of the requirement that it locate "*all* sites that appear to qualify for listing on the National Register of Historic Places." Executive Order No. 11593, 36 F.R. 8921, *reprinted in* 16 U.S.C. § 470 at 28. (emphasis added). We assume without deciding that the survey methods adequately identified the likely locations of eligible sites. We cannot condone, however, the Navy's failure to gather in all the fruits of its survey.

Far from suggesting that the Navy must perform the impossible, we conclude only that it must follow up on the leads

produced by the survey it commissioned.[51] Our conclusion does not require the Navy to undertake a 100% survey of Vieques. The current survey not only disclosed the probable existence of other sites but also established the archeological sterility of certain areas of the island; further efforts in those areas would be fruitless. It is not possible to ascertain from the present record which areas do require more investigation. Once the survey results are clarified, the district court, with the aid of the parties, should be able to define with fair precision what additional action is required of the Navy. We assume that any proposal made by the Navy to complete its obligation to locate all sites will be formulated in consultation with the Commonwealth officer responsible for historic preservation, as mandated by Executive Order 11593 and 36 C.F.R. § 800.4. Finally, although our decision pertains solely to the Navy's survey efforts, the district court is not foreclosed from considering on remand whether the Navy has taken sufficient measures to safeguard any sites which have been or are likely to be located and may be eligible for inclusion in the National Register.[52]

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[51] We agree with the Commonwealth that the Navy would be well advised to emulate the cooperation shown by the Pacific Fleet in the survey of the Hawaiian island of Kahoolawe. *See Aluli* v. *Brown*, 437 F. Supp. 602 (D. Hawaii 1977), *rev'd in part on other grounds*, 602 F.2d 876 (9th Cir. 1979). This does not mean, however, that an exact replication of the Kahoolawe survey, which will ultimately cover 100% of the surface area of the island, is required of the Navy with respect to Vieques. Unlike Kahoolawe, it appears very unlikely that the entire island of Vieques would be eligible as a single district for inclusion in the National Register. *See Aluli* v. *Brown*, 437 F. Supp. at 610. What impresses us about the Kahoolawe survey is the extensive cooperation between the Navy and state officials and the good faith effort to locate all potentially eligible sites.

[52] The Navy urges that the pending Memorandum of Agreement between it and the Advisory Council obviates any further judicial scrutiny of its efforts to comply with the Executive Order and the regulations. But such agreements relate to the mitigation of adverse effects on sites that already have been located. *See* 36 C.F.R. § 800.6 (b), (c). The pending agreement would be complete only after the

We vacate the district court's decision on the adequacy of the Navy's efforts to locate all sites of historical or archeological value, and remand for further consideration in light of this opinion.

The Remedy

We turn finally to a review of the district court's remedial order with respect to three rulings. The court held as follows:

> (1) That Defendant Navy is in violation of the Federal Water Pollution Control Act, *supra*, by reason of its lack of a NPDES permit to cover the occasional release or firing of ordnance into the waters of Vieques,
>
> (2) That Defendant Navy is in violation of Executive Order 11593, *supra*, by reason of its failure to nominate to the Secretary of the Interior various sites in Vieques that may be eligible for listing in the National Register of Historic Places, and/or by its failure to seek the opinion of the Secretary respecting said eligibility, and
>
> (3) That Defendant Navy is in violation of the National Environmental Policy Act, *supra*, by its failure to file an environmental impact statement in connection with its activities in and around Vieques.

478 F. Supp at 705. The court ordered the Navy to take the necessary steps to achieve compliance, but refused to enjoin the Navy from continuing its training operations. *Id.* at 708. The Commonwealth challenges the court's denial of its request for a prohibitory injunction as mistakenly based on a balancing of equities. According to the Commonwealth, having found the Navy in violation of the NEPA, the FWPCA, and the Executive Order, the court had no choice but to halt the Navy's operations until the violations were cured. We consider this challenge as directed to each of the three rulings.

Navy has fulfilled its obligation to locate all eligible sites. If an agreement has been executed, we expect that the district court would consider it in evaluating the adequacy of the Navy's efforts to protect the eligible sites.

1. The NPDES Permit Requirement

With respect to the violation of the Federal Water Pollution Control Act, we conclude that the district court erred in undertaking a traditional balancing of the parties' competing interests. In *TVA* v. *Hill*, the Supreme Court refused "to strike a balance of equities" where "Congress, exercising its delegated powers, has decided the order of priorities in a certain area . . . ." 437 U.S. 153, 194 (1978); *see also United States* v. *City and County of San Francisco*, 310 U.S. 16, 30-31 (1940). Like the statutory mandate at issue in *Hill*, the NPDES permit requirement of the Federal Water Pollution Control Act embodies a congressional ordering of priorities. Congress has prohibited "the discharge of any pollutant," 33 U.S.C. § 1311(a), which includes the Navy's dropping of ordnance into the coastal waters, unless a NPDES permit has been secured pursuant to 33 U.S.C. § 1342. Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit. Thus, regardless of the district court's finding that the Navy's dropping of ordnance caused no significant harm to the environment, it erred in failing to consider the judiciary's "responsibility to protect the integrity of the . . . process mandated by Congress . . . ." *Jones* v. *Lynn*, 477 F.2d 885, 892 (1st Cir. 1973); *see Realty Income Trust* v. *Eckerd*, 564 F.2d 447, 456-57 (D.C. Cir. 1977).[53] Although on this record the district court did not clearly err in its finding, the permit process "might reveal substantial environmental consequences," *City of New York* v. *United States*, 337 F. Supp. 150, 160 (E.D.N.Y. 1972), *quoted in Realty Income*

[53] Although *Jones* and *Eckerd* involved the procedural requirements of the National Environmental Policy Act, we think this responsibility holds as true with respect to the NPDES permit process. *See Save Our Sound Fisheries Ass'n* v. *Callaway*, 387 F. Supp. 292, 299-300 (D.R.I. 1974).

Trust v. *Eckerd*, 564 F.2d at 456, that would lead the Administrator to deny the application or grant only a limited permit. Unlike the situation presented in *Essex County Preservation Ass'n* v. *Campbell*, 536 F.2d 956, 960-61 (1st Cir. 1976), where the statutory violation was deemed "technical," here the Navy has utterly disregarded the statutory mandate.[54] Thus, we vacate the district court's order on this question and remand with instructions to order the Navy to take all steps necessary to insure that no ordnance is discharged into the coastal waters of Vieques until such time as it obtains a NPDES permit.[55] If this order significantly interferes with the Navy's preparedness, it is free to request the President to exempt it from the NPDES requirements in the interest of national security. *See* 33 U.S.C. § 1323(a).

2. Executive Order 11593

The Commonwealth offers no reason for us to alter the district court's order insofar as it requires the Navy to protect all sites that may be eligible for inclusion in the National Register of Historic Places. Given the district court's finding that the Navy's operations do not presently threaten the known sites, which is not clearly in error, it was not an abuse of the court's discretion to impose a limited order rather than a wholesale proscription of the Navy's operations. Although, as already discussed, we have decided that the Navy has yet to satisfy its duty under Executive Order 11593, nothing in the present record suggests that the training activities as a whole endanger the additional sites likely to be located. It is open to

[54] Unlike the environmental impact statement requirement of the NEPA, 33 U.S.C. § 1311(a) is not satisfied by the filing of any application; only the granting of a NPDES permit releases a party from that provision's prohibition. Thus, our conclusion is not altered by the fact that the Navy has now applied for a permit.

[55] Insofar as most, if not all, of the Navy's targets are land based, we doubt that this order will significantly impair the Navy's military preparedness.

the district court on remand to modify its order in light of further discoveries or evidence that the Navy has failed to safeguard the potentially eligible sites.

3. The Environmental Impact Statement

Since entry of the district court's judgment, the Navy has prepared a final environmental impact statement (EIS), as required by the court's order and 42 U.S.C. § 4332(2)(C). As a result, we conclude that the issue of whether the training operations should be halted for failure to prepare and file and EIS is moot. Although neither party raised this question, this court has a responsibility to consider *sua sponte* whether an issue on appeal has been rendered moot by subsequent events. *See North Carolina* v. *Rice*, 404 U.S. 244, 245 (1971). At oral argument, counsel for the Navy informed us that a final EIS had been prepared and we assume that it has been filed in accordance with 42 U.S.C. § 4332(2)(C). *See DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974). Nothing would be gained by enjoining the Navy's operations for failure to do that which it has done. *See id.* at 316. Nor is there a " 'reasonable expectation that the wrong will be repeated.' " *United States* v. *W.T. Grant Co.* 345 U.S. 629, 632 (1953), *quoted in County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). Because our conclusion pertains only to the preparation and filing of an EIS, it does not foreclose the Commonwealth from challenging the adequacy of the EIS or the Navy's response to the EIS findings. *See Crowell* v. *Mader*, 444 U.S. 505, 506 (1979). We therefore vacate the order of the district court requiring the Navy to prepare and file an environmental impact statement with instructions to dismiss the claim as moot.

Summary

We affirm the district court's findings and rulings, as modified by our opinion, except as follows:

(a) the decision with respect to § 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409, is vacated and

remanded for dismissal of the claim for lack of jurisdiction:

(b) the decision with respect to § 4 of the Noise Control Act, 42 U.S.C. § 4903(a), and Puerto Rico's criminal nuisance statute, P.R. Laws Ann. tit. 33, § 1365, is vacated and remanded for dismissal of the claim for lack of jurisdiction;

(c) the findings and ruling with respect to § 7(a) and § 9 of the Endangered Species Act, 16 U.S.C. §§ 1536(a), 1538, are vacated and remanded for further consideration;

(d) the ruling with respect to Executive Order 11593 and 36 C.F.R. § 800.4 is vacated and remanded for further consideration;

(e) the order with respect to the NPDES permit requirement is vacated and remanded with instructions for further proceedings in accordance with this opinion is filed this day.

(f) the order with respect to the preparation and filing of an environmental impact statement pursuant to 42 U.S.C. § 4332(2)(C) is vacated and remanded with directions to dismiss.

Affirmed in part, vacated in part and remanded in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1626.

CARLOS ROMERO-BARCELO, ETC., ET AL.,
Plaintiffs, Appellants,

CARLOS ZENON, ET AL.,
Plaintiffs-Intervenors, Appellees,

v.

HAROLD BROWN, ET AL.,
Defendants, Appellees.

CORRECTED JUDGMENT

Entered Nunc Pro Tunc January 26, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The District Court's Findings and Rulings as modified by the opinion of this court filed this day are affirmed except as follows:

(a) the decision with respect to §15 of the Rivers and Harbors Act of 1899, 33 U.S.C. §409, is vacated and remanded for dismissal of the claim for lack of jurisdiction;

(b) the decision with respect to §4 of the Noise Control Act, 42 U.S.C. §4903(a), and Puerto Rico's criminal nuisance statute, P.R. Laws Ann. tit. 33 §1365 is vacated and remanded for dismissal of the claim for lack of jurisdiction;

(c) the findings and ruling with respect to §7(a) and 9 of the Endangered Species Act, 16 U.S.C. §§1536(a), 1538, are vacated and remanded for further consideration;

(d) the ruling with respect to Executive Order 11593 and 36 C.F.R. §800.4 is vacated and remanded for further consideration;

(e) the order with respect to the NPDES Permit Requirement is vacated and remanded with instructions for further proceedings in accordance with the opinion filed this day; and

(f) the order with respect to the preparation and filing of an environmental impact statement pursuant to 42 U.S.C. §4332(2)(C) is vacated and remanded with directions to dismiss.

No costs.

By the Court:

DANA H. GALLUP
Clerk.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO.

Carlos Romero-BARCELO,
Governor of Puerto Rico, et al., *Plaintiffs*,
Carlos Zenon et al., *Plaintiffs-Intervenors*,
v.
Harold BROWN et al., *Defendants*.

Luis MEDINA et al., *Plaintiffs*,
Fundacion Arqueologica, Antropologica E Historica De Puerto Rico, *Plaintiff-Intervenor*,
v.
Harold BROWN et al., *Defendants*.

Civ. Nos. 78-323, 78-377.

September 17, 1979

Miguel Gimenez Munoz, Secretary of Justice, Commonwealth of Puerto Rico, San Juan, Puerto Rico; Gerardo A. Carlo, Special Counsel to the Governor, Commonwealth of Puerto Rico, La Fortaleza, San Juan, Puerto Rico; Lewis A. Rivlin, John A. Hodges, Sanda M. Kayden, Peabody, Rivlin, Lambert & Meyers, Washington, D.C.; Timothy L. Harker, Washington, D.C.; Jorge L. Cordova, Charles R. Work, Collister Johnson, Theodore A. Miles, Washington, D.C. (of counsel), for plaintiffs Carlos Romero-Barcelo, Governor of Puerto Rico, *et al.*

Pedro J. Saade Llorens, Servicio Legales, Santurce, Puerto Rico, for plaintiffs-intervenors Zenon, *et al.*

Judith Berkan and Pedro J. Varela, Hato Rey, Puerto Rico, for plaintiffs Medina, *et al.*

Wilfredo A. Geigel, Santurce, Puerto Rico, for plaintiff-intervenor Fundacion Arqueologica, Antropologica e Historica de Puerto Rico.

Julio Morales Sanchez, U.S. Atty., San Juan, P.R., for defendants.

DECISION AND ORDER

TORRUELLA, *District Judge.*

In substance, these suits concern the military use by the United States Navy of land which it owns in the Island of Vieques, a civilian municipality of the Commonwealth of Puerto Rico. They bring into focus the delicate and complex constitutional interplay that exists between our three branches of Government, as well as between the Federal and local establishments and its citizens.

I. Procedural Preface

The parties to these actions are as varied and as multifarious as the issues which they raise.

In Civil Number 78-323 the Plaintiffs[1] are Carlos Romero Barceló, who is the Governor of the Commonwealth of Puerto Rico, Radamés Tirado Guevara, the Mayor of Vieques, and the Environmental Quality Board, an administrative agency of the Commonwealth charged by law with protection of the environment in Puerto Rico.[2] The Defendants in that suit are Harold Brown, Secretary of Defense of the United States, W. Graham Claytor, Jr., the Secretary of the Navy, James L. Holloway, Chief of Naval Operations, I. C. Kidd, Jr., Commander in Chief of the Atlantic Fleet, and Louis H. Wilson, Commandant of the Marine Corps.[3] After the commencement of this suit on March 1, 1978, additional Plaintiffs sought and received permission to intervene. They were Carlos

[1] These Plaintiffs will hereinafter be collectively referred to as "Plaintiffs Romero-Barceló, et al."

[2] See 12 L.P.R.A. §1131; *Commonwealth of Puerto Rico* v. *S. S. Zoe Colocotroni*, 456 F.Supp. 1327, 1337 (D.P.R.1978).

[3] These Defendants, together with other Defendants mentioned in Civil Number 78-377, will hereinafter be collectively referred to as "Defendant Navy."

A. Zenón, Mario Félix, Mariano Rivera Guishard, Alicio Ayala Soto, Francisco Medina Meléndez, Esmeraldo Meléndez and Santos Ríos, fishermen who are residents of Vieques, and the "Asociación de Pescadores de Vieques, Inc.", a cooperative of Vieques fishermen.[4]

The Plaintiffs in Civil Number 78-377, which was filed on March 8, 1978, are Luis Medina, Jesús Medina, Mario Antolino Félix, Cristóbal Medina, Severino Ventura Cintrón, Héctor Medina, Cristóbal Medina, Jr., Enrique García, Antonio Ayala González, Angel Ventura, and Daniel Medina, all fishermen and/or residents of Vieques, and Misión Industrial de Puerto Rico, Inc., an entity which is allegedly interested in advocating environmental causes.[5] Intervention was also sought and allowed in this case on behalf of "Fundación Arqueológica, Antropológica e Histórica de Puerto Rico", a non-profit corporation involved in research and preservation of historical and prehistorical cultural resources.[6] The Defendants in this suit are the same as those in Civil Number 78-323, except for the addition of William R. Flannagan, Caribbean Commander of the Atlantic Fleet, Swain Wilson, Commandant of the United States Coast Guard, and unnamed John Doe Defendants.

After various preliminary procedural interchanges, including a hearing in which a request for a temporary restraining order was denied in Civil Number 78-377, Civil Numbers 78-323 and 78-377 were consolidated. It is appropriate to briefly set forth the allegations in the various complaints.

Plaintiffs seek to enjoin Defendant Navy from using any portion of its lands in Vieques, or in the waters which surround this Island, for the purpose of carrying out naval training operations. Broadly speaking, the complaints allege harm to all residents of Vieques, to its fishing and agricultural industries, to certain endangered species of plant and wildlife,

[4] These Plaintiffs-Intervenors will hereinafter be collectively referred to as "Plaintiffs Zenón, et al."

[5] These Plaintiffs will hereinafter be collectively referred to as "Plaintiffs Medina, et al."

[6] This Plaintiff-Intervenor will hereinafter be referred to as "Plaintiff Fundación."

to officially designated and unidentified historical sites and to private property, all as a consequence of Defendant Navy's activities.

The main thrust of Plaintiffs Romero Barceló's allegations in Civil Number 78-323 is related to claims of violation by Defendant Navy of various environmental laws. These claims include the alleged failure of Defendant Navy to prepare and file an environmental impact statement pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. §§4321 *et seq.*), as well as other substantive offenses thereunder, and alleged violation of the Federal Water Pollution Control Act of 1972 (33 U.S.C. §1311), the Water Pollution Control Act of Puerto Rico (24 L.P.R.A. §§591, *et seq.*), Public Policy Environmental Act (12 L.P.R.A. §§1121 *et seq.*), and Executive Order No. 11752 (38 F.R. 34793); the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. §§1401, 1411 and 1412); the Clean Air Act (42 U.S.C. §§7401 *et seq.*); the Noise Control Act of 1972 (42 U.S.C. §§4901 *et seq.*) and the general Nuisance Law of Puerto Rico (33 L.P.R.A. §1365); the Resource Conservation and Recovery Act (42 U.S.C. §§6901 *et seq.*); the Endangered Species Act of 1973 (16 U.S.C. §§1531 *et seq.*); the National Historic Preservation Act (16 U.S.C. §§470 *et seq.*), and Executive Order 11593 (36 F.R. 8921); the Coastal Zone Management Act (16 U.S.C. §§1451 *et seq.*); the Marine Mammal Protection Act of 1972 (16 U.S.C. §§1361, *et seq.*); the Rivers and Harbors Act of 1899 (33 U.S.C. §407); the First and Fifth Amendments to the Constitution, and Presidential Orders and Congressional restrictions relating to the transfer of military activities from the Island of Culebra, another off-shore municipality of the Commonwealth.[7] The allegations of Plaintiffs Zenón et al are substantially a copy of the complaint of Plaintiffs Romero Barceló et al, with the exception that additional contentions are made with regards to violations of the Federal Relations Act of 1950 (48 U.S.C.

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[7] See *Feliciano* v. *United States*, 297 F.Supp. 1356 (D.P.R.1969), *aff'd*, 422 F.2d 943 (C.A. 1, 1970), cert. den. 400 U.S. 823, 91 S.Ct. 44, 27 L.Ed.2d 51 (1970).

§749) and the Water Law of Puerto Rico (12 L.P.R.A. §§1501-1523).

In Civil Number 78-377 Plaintiffs Medina et al, in addition to also relying on the previously enumerated claims, allege various other basis for relief, including a challenge to the taking and acquisition by Defendant Navy of the land on which the activities subject of these suits are carried out, allegations of violation of the Organic Act of 1900 ("Foraker Act") (31 Stat. 77), the Organic Act of 1917 ("Jones Act") (39 Stat. 951), the Federal Relations Act (64 Stat. 319, 48 U.S.C. §731 *et seq.*), and of certain treaties (15 U.S.T. 1636), by virtue of Defendant Navy's use of the navigable waters surrounding Vieques, and claims for damages arising by reason of Defendant Navy's allegedly intentional and/or negligent actions, which claims are ostensibly grounded on the Federal Tort Claims Act (28 U.S.C. §2671 *et seq.*). The contentions of Plaintiff Fundación are similar to parallel ones by Plaintiff Romero Barceló et al, based on the National Historic Preservation Act of 1966, supra, and Executive Order 11593, supra.

For the present moment, suffice it to say that Defendant Navy's answers put at issue Plaintiffs' allegations and resulted in a trial lasting three months in duration. Sixty three witnesses, many of them leading authorities in various fields of expertise, as well as hundreds of exhibits were presented during the course of this legal marathon. Additionally, at the request of the parties, the Court conducted two field trips to various sites in and around Vieques. The Court consolidated the preliminary and permanent injunction hearings.

Because these cases present such an all-inclusive challenge to Defendant Navy's presence and activities in Vieques, we must commence our homeric voyage through this evidence with some relevant background discussion about the Island in question.

II. Background

A. Physical Biography

Vieques is a long narrow island located approximately 6 miles off the Southeastern coast of the main Island of Puerto Rico and about 9 miles due South of its sister municipality of Culebra. It is nearly 20 miles long and 4.5 miles wide at its widest point, and is oriented on an East-West axis. The Island has an area of about 33,000 acres or 51 square miles of land.

The topography of Vieques is dominated by a backbone of rolling hills several hundred feet in height leading up to Monte Pirata in its western extremity, which at nine hundred and eighty one feet is the highest point on the Island. The shores are principally composed of calcareous sandy beaches, interrupted by several rocky promontories, particularly in the eastern extremities, and in the points of the various half-moon bays located throughout the southern coast. There are fringe and off-shore coral reefs mostly in the northern, eastern and southern sectors.

The mean average temperature is 80° and the average annual rainfall is 46.23 inches, mostly concentrated in the central and western areas. There are no permanently flowing fresh water streams or rivers. Generally speaking the prevailing winds are from the East; however, they tend to bend towards the Northeast along the north coast and the South East along the southern shores.

The ocean and wave action follow a pattern similar to that of the wind. The ocean currents are also generally wind-oriented from East to West, but tidal flow can affect this pattern substantially, particularly in the eastern and western extremities of the Island where the tide moves north when ebbing and south when flooding.

The biota of Vieques is typical of a Caribbean Island with low population density but contains some unique features as well.

The flora is in large part determined by the various humidity zones as well as the present land use, a matter we

shall presently deal with in greater detail. Suffice it to say for the moment that it generally tends to run from thorny brush in the East to lusher vegetation in the West, the central strip being subjected to some cultivation of minor crops. Scrub grass covers much of the bare ground throughout Vieques. There are several large stands of mangrove along the coast, the most important of which are in the vicinity of Punta Arenas in the West, and surrounding Puerto Mosquito, Puerto Ferro and Ensenada Honda on the South. Inland from these are generally found dryland forests of ucar (*Bucida buceras*). Many areas of the ocean floor in the immediate vicinity of the coast are covered with stands of sea grasses, mostly of the *thalassia* variety, the largest of these concentration starting West from Punta Caballo on the North coast and fanning around Punta Arenas to the South West. There are also large seagrass areas in the South in Ensenada Honda and in Bahia Salinas del Sur.

Vieques' animal life includes several species of particular interest to the present action. In addition to the usual complement of fish and bird population[8] there are present in Vieques six species which are designated as either "endangered" or "threatened" pursuant to statute or regulations.[9] These are the brown pelican (*Pelecanus occidentalis*),[10] the manatee (*Trichechus manatus*),[11] the leatherback turtle (*Dermochelys cariocea*),[12] the hawksbill turtle (*Eretmochelys imbricata*),[13]

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[8] There are no wild land mammals in Vieques other than rodents, mongooses, and bats. They, as well as the various resident species of land reptiles and crustacians, play no significant role in this controversy.

[9] 16 U.S.C. §§1361 *et seq.*; 16 U.S.C. §§1531 *et seq.*

[10] 35 Fed.Reg. 16047 and 18319, 50 C.F.R. §17.11, p.12. Puerto Rican residents of this species are a subspecies denominated *pelecanus occidentalis occidentalis*.

[11] 16 U.S.C. §1362(5); 50 C.F.R. 17.11 p. 59.

[12] 50 C.F.R. 17.11 p. 80.

[13] *Id.*

the loggerhead turtle (*Caretta caretta*),[14] and the green turtle (*Chelonia mydas*).[15]

Three coves in the Southern coast of Vieques (Puerto Mosquito, Puerto Ferro and Bahia Tapón) contain an unusual phenomena found occasionally[16] in protected shorelines of tropical waters, within very particular physical and biological parameters. This phenomena is known as bioluminescense, a process which has not been fully explored scientifically but which is believed to be related to the presence of microscopic dinoflagellate[17] activated by specific physical circumstances.

B. Pre-History And History

A brief look at Vieques' pre-history and history will give us some insight into the problems we are faced with in the present case.

The first semi-permanent inhabitants of Vieques were Carib Indians. They arrived in the period immediately preceding the discovery of Vieques by Christopher Columbus (1493), and for various decades thereafter.[18] These sea-going tribes came up from the northern coast of South America via the Lesser Antilles and used Vieques as a base from which to carry out their fierce raids into Puerto Rico. Prior thereto, commencing as far back as perhaps 850 A.D., various migratory waves of Arawak Indians[19] which originated in the

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[14] *Id.*

[15] *Id.*

[16] Only four other similar bays are known to exist in the World.

[17] *Pyrodinioura bahamense* (Pyrcophyta-Dinoflagellata).

[18] Some sources date the Carib's arrival to Vieques at about 1480. See Irving Rouse, "Scientific Survey of Porto Rico and the Virgin Islands", Volume XVIII, Part 4, page 565, New York Academy of Sciences, New York, 1952.

[19] Id. Both the Igueri (Saladoid) and Taino cultures of the Arawaks were ceramic and agricultural, which are normally indicative of higher social organization. It is probable that preceramic (Coroso) Indians preceded the Arawaks to Vieques, and perhaps also Ciboney Indians from Hispanola. Id. p. 570.

Orinoco Basin, passed through the Island on their way to more permanent abode in Puerto Rico and Hispanola. In historic times, Indians from Puerto Rico and St. Croix, Virgin Islands moved to Vieques to escape the Spanish conquest.[20] The Spanish forces sent to conquer Vieques had little influence on the native population living there and no attempt was made by Spain to colonize the Island at this point.

During the 17th and 18th Centuries the French, English, Dutch and Danes all attempted to establish footholds on Vieques. In 1673 the Spanish attacked and destroyed the colonial population and thereafter continued to send military expeditions from time to time. In 1816, colonists from Saint Thomas and St. Croix asked and received permission to establish a livestock industry in Vieques, and thus began what is today the Island's dominant agricultural activity. One year later the Governor of Puerto Rico delegated authority to one of these colonists and thereafter a fort was built at Isabel Segunda, the capital of Vieques. By 1828 the population of Vieques was 122 engaged mostly in timber harvesting for export to the Virgin Islands, in the growing of crops and livestock, and in fishing. After 1869, economic activity increased and sugar cane became the leading crop.

In 1898, and as a result of the Spanish-American War Vieques together with the rest of the present-day Commonwealth of Puerto Rico became a territory of the United States.[21] Through the early 1940's, the principal activities in Vieques were the growing of sugar cane and livestock, and fishing. The total population throughout this period fluctuated between 6,000 and 12,000. The population of Vieques according to the 1970 census, was 7,767 persons of which 2,378 lived in Isabel Segunda and 620 in Esperanza, the Island's two towns, and 4,769 were classified as rural in-

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[20] Ironically, in recent times many present day inhabitants of Vieques have migrated to St. Croix.

[21] See Treaty of Paris of 1898, Art. II, 1 L.P.R.A. Historical Documents, p. 17; see also, *Balzac* v. *Porto Rico*, 258 U.S. 298, 305, 42 S.Ct. 343, 66 L.Ed. 627 (1922).

habitants. Sugar is no longer of any relevance, and the principal agricultural endeavours are related to the planting of some minor crops, and to livestock. Fishing is still of importance to the local inhabitants.

As previously stated, Vieques is a civilian municipality of the Commonwealth of Puerto Rico. It is divided into seven wards ("barrios"): Puerto Diablo, Puerto Ferro, Puerto Real, Florida, Mosquito, Llave and Punta Arenas. During the period from 1939 to 1944, Defendant Navy acquired title by purchase to 26,000 of the 33,000 total acres of Vieques. This property is physically divided into two sections and is bisected by the civilian area of Vieques. (See Appendix A).

The eastern part of the naval reservation includes Barrio Puerto Diablo and most of Barrio Puerto Ferro. The western part begins at a north-south line which commences west of Punta Caballo and continues south to the eastern end of Laguna Playa Grande. It includes the barrios of Punta Arenas, part of Mosquito, Llave and Florida. There is also an additional area in the middle of civilian sector known as Barriada Monte Santo, to which Defendant Navy holds title but in which there has been considerable civilian squatting with Defendant Navy's knowledge and acquiescence.[22]

III. Defendant Navy's Activities In And Around Vieques

Generally speaking, in the eastern sector are located a Marine Corps facility known as Camp García, a 5000 foot airstrip not presently in active use, a heliport, a field ammunition depot, the bulk of the beaches used for amphibious landings, an observation post complex on top of Cerro Matias, and the various ordinance impact zones, with related targets. The western sector is mainly used for the storage of ammuni-

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[22] This parcel, together with various other parcels in the other two sectors of Defendant Navy's Vieques properties, have been declared surplus property and turned over to the General Services Administration, who has for some time been conducting interminable negotiations with the Commonwealth Government for their transfer.

tion in the bunkers spread throughout this area, as well as for quarrying, some amphibious operations, and some of the non-firing small unit training. Also in this sector is located a breakwater-pier at Desembarcadero Mosquito, an administrative center, and an electronic warfare facility on the summit of Monte Pirata.

Defendant Navy's properties in Vieques are part of a much larger and inclusive military complex known as the Atlantic Fleet Weapons Training Range, which consists of four ranges: the inner range in the east end of Vieques, previously alluded to; the outer range, which is an ocean range extending both north and south of Puerto Rico and to the east; the underwater tracking range at St. Croix, Virgin Islands; and an electronic warfare range. All of the operations of these various ranges are directed from a center located at the Roosevelt Roads Naval Station in Ceiba, Puerto Rico, approximately 7 miles northeast of Vieques across Vieques Sound.

The outer range is at least 35 miles north of Vieques and 20 miles to the south. On this range are conducted various surface and anti-aircraft gunnery exercises as well as missile exercises, including surface-to-air, surface-to-surface, air-to-surface and air-to-air training.

The underwater tracking range is located in waters varying in depth from 200 fathoms to 500 fathoms off the western shore of St. Croix (and southeast of Vieques), and encompasses 21 square nautical miles. This range is used for training for accurate three-dimensional tracking of surface and underwater objects.

The electronic warfare range is a complex of so-called threat platform simulators located at various sites in Puerto Rico and adjacent islands, including Monte Pirata as previously stated, as well from one sea-going location. These facilities provide a realistic electronic environment for the training of shipboard electronic warfare teams and tactical electronic order-of-battle, in support of exercises and operations conducted on the various other ranges.

A. The Inner Range

The inner range (see Appendix B), which consists of air-to-ground, ship-to-shore, and artillery targets, is locally controlled from the observation post previously mentioned atop Cerro Matias. The post is surrounded by a 1200 yard safety zone into which no ordnance may be discharged.

The public is notified that the range will be used through notices to airmen, notices to mariners and fishermen's notices. Fishermen's notices indicate the schedule of activities for the following week and include a map of the island of Vieques for aid to the reader in determining the activated areas. These notices are widely distributed and posted, including at the fishermen's cooperative. In the event of a change in activities, a written schedule is printed and distributed at least 24 hours in advance to fishermen. Defendant Navy does not restrict access to the waters in the danger zone[23] at Vieques except shortly prior to, during, and immediately after training operations utilizing these waters.

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[23] As a further warning device regarding the danger zone, Defendant Navy has placed a buoy at the western edge of the danger zone in the southern coast, established under 33 C.F.R. 204.234. The buoy consists of 3 yellow balls, each about 4 feet in diameter, welded together, on which there is a triangular warning sign.

There are two restricted areas (see 33 C.F.R. 207.815(2), (3)), in the coastal waters off Vieques, activated at all times: one on the south coast around the Camp Garcia area, extending 1,500 yards offshore; and a second one around the Naval Ammunition Facility at the west end of the Island, including Mosquito Pier, extending 1,500 yards offshore.

Defendant Navy has both CB radios and a VHF unit for communication with the fishermen. In fact, Defendant Navy installed a VHF unit in the fishermen's cooperative for their use in contacting the observation post atop Cerro Matias. This has proven to be a useless gesture as the fishermen either refuse or neglect to make use of this facility.

On shore, there are warning signs in Spanish and English posted at intervals along the entire length of the cattle fence which acts as the western boundary of the inner range. Signs are also posted along the beaches.

This range normally opens at 7:30 A.M., with firing commencing at 8:00 A.M., and usually closes at 10:00 P.M.[24] When the range is active, a red eight-foot square flag is flown from a 15 foot pole above the observation post during the daylight hours, and a red rotating beacon is operated at all times. Prior to commencing range use, a patrol aircraft covers the water areas around the Island to assure that the area is clear. When required, a patrol boat is also used for this purpose. The range control officer on location can visually observe the entire land mass area and the surrounding sea and air space for considerable distances.[25] Additionally, there are two radars observing the surface water area and to maintain the position of ships while firing on the range.[26]

In the event of unauthorized entry on the range while the same is in use, the range officer immediately halts the firing and personnel is dispatched to clear the range fouler. The United States Coast Guard provides assistance for such contingencies in the danger areas of the surrounding waters.

There have been occasions when ships or aircraft have disregarded safety precautions incorporated in the range user's manual or the range officer's instructions. The range officer has authority, which has in fact been exercised at times, to order an offender off the range.

In addition to fire control and related safety measures, one of the principal functions of the observation post is the

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There is a guard at the main gate of Camp Garcia to prevent the entry of unauthorized personnel into the eastern end of the Vieques Naval properties. The cattle fence is patrolled.

[24] Operations are authorized until 11:00 P.M. at a safety cushion. Exceptions have been made for naval gunfire exercises, and for air-to-ground operations with inert ordnance. In rare instances, the range has opened at 6:00 A.M.

[25] For visual observation the range officer is usually assisted by binoculars. The range of unaided, accurate, line of sight observation from the observation post is approximately 5 miles on a clear day.

[26] Aircraft are tracked by radar located at the Roosevelt Road center.

scoring of the firing. This is accomplished visually, in the case of ship-to-shore firing, and by television in the case of air-to-ground bombing.

The eastern boundary of the inner range is a north-south fire break, approximately 20 meters in width, running from a point just west of Bahia Playa Blanca and continuing directly south to the shore west of Cerro Indio. This boundary is referred to by Defendant Navy as the "Eastern Friendly Front Line." No ordnance is used east of this demarcation. Immediately to the west of this line commences the Air Impact Area and Close Air Support Zone (AIA/CAS) which extends west to another north-south fire break known as the "Western Friendly Front Line." This line commences on the shore of Bahia Icacos and runs directly south past the eastern edge of an unnamed lagoon, to the beach at Bahia Salinas del Sur. The area between the two "Friendly Lines" is also known as the Naval Gunfire Support Range (NGFS). West of the Western Friendly Front Line is the Surface Impact Area (SIA) which runs to another north-south boundary commencing from a point west of Bahia Fanduca in the south, to the north shore three fourths a mile east of Puerto Diablo. A cattle fence, which is approximately 1,000 yards west and parallel to this SIA boundary, marks the western most extension of the inner range.

Since most of the controversies in this case arise out of Defendant Navy's activities within inner range, we shall describe these and the facilities therein located with greater detail.

(1) The targets

The inner range contains two bullseye targets, referred to as Targets 1 and 2. These are used for inert ordnance practice with Mark 76 practice bombs[27] and 2.75 mm. inert rockets. Live ordnance is never used on these targets. Target 1 is located approximately half way up on the Western Friendly

[27] 250 pound bombs.

Front Line. It is 400 feet in diameter and consists of 4 concentric rings of tires, 50 feet apart. Target 2, which is made up of three similar rings 300 feet in diameter, is located approximately two statute miles west of Target 1.

At the southern extremity of the Western Friendly Front Line is located a strafing target. Again, only inert ordnance is used against this target.

The AIA/CAS zones are the air-to-ground live ordnance target areas.[28] The targets consist of realistic mockups of an airstrip, a fuel farm, a motor pool, an ammunition dump, SAM rocket sites, and numerous targets of opportunity such as tanks, a convoy and airplanes. (See Appendix B).

There is also one stationary water target currently active[29] located about a mile off the eastern tip of Punta Este and consisting of a floating buoy. It was installed for inert, air-to-ground activity and has been used very infrequently.

A Mark 33 SEPTAR, which is an 18 foot drone target boat operated remotely from Cerro Matías, is sometimes operated in Bahia Salinas del Sur for air-to-ground exercises using inert ordnance.

In August of 1977 a target barge was anchored off the southeastern tip of Vieques for about a month. A guided 500 pound inert glide bomb called SMART ROC was fired at it.

All of the targets described above in the inner range, with the exception of the water targets, were installed and operational by the end of 1971. Some of the targets in the SIA and AIA were in use for some years prior to that.

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[28] They also contain some targets against which only inert ordnance is allowed.

[29] Sometime around 1976 a landing craft, the USS Killen, was anchored just north of Roca Alcatraz, in Bahía Salinas del Sur, and used as a floating target using live Mark 82 Series 500-pound bombs. The ship was eventually leveled to the waterline and it broke-up and sunk sometime in the Spring of 1977. The wreck is presently sitting in two sections on the bottom of Bahía Salinas del Sur.

(2) Air-to-ground activities

The type of aircraft usually involved in ordnance delivery on the AIA/FAS targets and on the two bullseye targets are A-4, A-6 and A-7 fix wing jet aircraft flying either from carriers lying offshore or from the Roosevelt Roads Station.

It is standard procedure to conduct safety and range use briefings for all range users, including air crews. These procedures are outlined in the range user's manual and will be discussed hereinafter.

Coming out of Roosevelt Roads aircraft take off on a heading of either 060° M and turn on a radial of 100° M headed out to an area 3 miles off the central Vieques coast. In a warning area north of Vieques known as Whiskey 428, the radial 100° M intersects Defendant Navy's operational area. Aircraft in this area must file a flight plan and are controlled by the Federal Aviation Administration (F.A.A.). At this point aircraft will be at about 6-7000 feet in altitude, climbing and proceeding easterly until they reach an area directly off Punta Este where they will begin a turn to the south. The aircraft must maintain altitude until they are inside a restricted area south of Vieques known as Romeo 7104, and then must descent immediately to an altitude of about 8000 feet and proceed over the target low enough to identify the same.

If the point of origin of aircraft coming into the inner range is an aircraft carrier operating in the north, they are required to pass through a designated area known as Point November, about 4 miles north of Vieques. The aircraft come in on a southerly heading through Point November at an altitude of between 12-15,000 feet. This altitude reservation is pre-established by agreement with the F.A.A.

If the aircraft carrier is operating to the south of Vieques, aircraft come in through Romeo 7104 as it lines up with Whiskey 428, in a two mile wide corridor on a northerly heading.

Normally aircraft come over the range area in groups of 3 or 4, 5 aircraft being the maximum that Targets 1 and 2 can handle in a pattern.

Aircraft loaded with either inert or live ordnance are not permitted by range regulations to overfly any civilian area, and no credible proof was presented during the trial of any practice to the contrary.

After the target identifying run, the aircraft must assume a course pointed at the designated target and with wings level, whereupon he is declared "cleared hot" after visual observation of the range control officer stationed at the observation post atop Cerro Matias.[10] Thereafter the pilot is permitted to arm the aircraft's master switch and to fire when he gets within the correct range. As the aircraft pulls off the target, it is required to advise the range officer that the master switch is on a "safe" position so that no ordnance may leave the plane. The minimum separation interval between different aircraft firing is 30 seconds. The second aircraft is not permitted to fire until the first aircraft over the target calls in that its master switch is "safe."

For bombing runs aircraft typically pass over target at about 1500 feet. In strafing, aircraft turn at about 3000 feet, fire at about 500 feet and pull out over the target at about 200 feet.

The course headings for the various targets are predetermined. The approach for Targets 1 and 2 and for the strafing target is from the south, on 010° M headings. Over Target 1 the pilot must make a right-hand turn off the target, except in instances where Target 2 is not activated when he may request a left-hand turn. The normal pattern for Target 2 is

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[10] In the case of operations conducted during the night time hours, the target identifying run is preceded by the dropping of parachute illumination flares. An exception to this made for night radar bombing with light inert ordnance, which is conducted only by special permission and after the pilot has made daylight runs on the same target.

counterclockwise. In a left-hand turn off Target 2, the closest distance to the civilian sector is about 5.8 miles (to Barrio Santa María).[31] The approach to the AIA/CAS targets is also from the south on courses of between 330° M and 030° M. Over the AIA/CAS targets the normal pattern is a right hand turn, although a left-hand turn can also be requested.

(3) Ship-to-shore activities

As previously intimated ship-to-shore firing is also conducted in the inner range. This takes place into the same AIA/CAS zone, on six point targets located around the shoreline of Bahía Salina del Sur and on two area targets. As in the case of air-to-ground range users, ships crews must receive a briefing prior to arrival on the range.

Ships fire only from the waters to the south of Vieques. Upon arrival at the range, each ship must work its way through the range, visually identifying each one of the point targets and plotting them on a chart. The naval gunfire range can accommodate two ships maneuvering on the range at one time, but only one ship can fire at a time. During gunfire, except on rare occasions, the ships are between three to eleven miles from the shoreline. As previously stated, while firing the ship's position is monitored by the observation post's radar. Only live ordnance is used by ships as it has been found that inert naval ordnance creates a safety and scoring problem by its propensity to ricochet and its difficulty of observation.

When ship-to-shore firing is scheduled, air-to-ground activity is restricted to Target 2.

(4) Field artillery

To the west of Cerro Matías is located the SIA, previously described, which is the Marine Corps artillery range.[32] This

[31] The width of a turn off Target 1 or 2 is about 1500-2000 yards offset from the Target rhumb line, except that sometimes in a right turn off Target 1 the pilot extends the turn and comes out to the end of the Island.

[32] This area has occasionally also been used for air-to-ground machine gun fire by Marine helicopter gun ships firing from west to east on targets on the side of a hill.

is the live ordnance target area which is closest to the civilian populated areas. It is approximately 6.2 miles from Barrio Santa María. This type of practice involves the firing of howitzers, singly or in batteries, from positions along the vicinity of the SIA's western boundary toward targets near the Western Friendly Front Line, that is, from west to the east. Howitzer activity normally occurs only twice a year during the Marine amphibious exercises which will be subsequently discussed.

B. The Ground Maneuvering Area (GMA)

The GMA is the principal Marine Corps training area in Vieques. This area is located within the zone comprised from the cattle fence previously described, which is the eastern boundary, all the way to the western property line contiguous to the civilian sector. The property line is marked by a chain link fence, topped by barbed wire.

(1) Camp García

On the south western extremity of the GMA is the Marine camp previously referred to, Camp García. This camp has sufficient facilities to accommodate several thousand troops, although its present complement is about 150 men. Camp García has been operational since the early 1940's although improvements and additions have been carried out until recent times. The intensity of its use has fluctuated with the variated state of world affairs.

The airstrip which is adjunct to the base is operational but has only been used once in recent years and this was to allow an emergency landing by a civilian aircraft. Air transport to the base is conducted through a heliport located on a grassy field. The frequency of use of the heliport depends in large part on the training pressures of the GMA. Normal helicopter traffic in and out of Camp García, or the pads atop Monte Pirata and Cerro Matías, does not overfly the civilian sector of Vieques.

(2) Amphibious landings

The GMA contains the beaches wherein the Marines conduct the bulk of their amphibious landings in Vieques.[11]

The principal landing beaches are called Red Beach and Blue Beach and are located on the south coast in an area designated as "Amphibious OP Area South", which runs from Punta Conejo on the east to Punta Negra on the west. Both beaches are immediately to the north of two cays approximately 2 1/2 miles apart but which are confusingly enough both called "Cayo Chiva." Yellow Beach, which is south of Cerro Matías in the immediate vicinity of Punta Matías, is rarely used because of the other activities that are conducted in the SIA zone. On the north coast, in the "Amphibious OP Area North", is located Purple Beach between Punta Goleta and Punta Campanilla. Purple Beach is also used infrequently.

A typical landing exercise on OP Area South involves various support ships in the vicinity of the south coast off the restricted area south of Red and Blue Beaches. Those are large amphibious attack transports from which are launched the landing craft and amphibious tracked vehicles. These vessels proceed to the beaches where they land the troops as well as supporting tank, field artillery and vehicle units.

In recent years these exercises have included vertical envelopment landings by helicopter-borne troops. These are sometimes conducted independently of conventional amphibious operations. Those maneuvers include helicopter carriers within the supporting fleet. The troop landings take place inland of the conventional landing beaches.

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[11] Green Beach (Punta Arenas) on the north western extremity of Vieques is also a designated landing beach, but has only rarely been used as such. It is in practice a recreational beach used in large part by both civilians from Vieques and weekend-visiting yachts from Puerto Rico notwithstanding its lying within the restricted area previously described in Note 23.

Landings are usually accompanied by realistic low-level support flights by Marine air units of fixed wing, jet aircraft or helicopter gunships. If ordnance is used, this is expended within AIA/CAS zone. Naval units may be involved in activities related to the NGFS area.

Upon landing the troops engage in various tactical maneuvers throughout the GMA related with the securing of predetermined objectives in the area. At times, the landings are opposed by "enemy" troops, which have periodically included units of the Puerto Rico National Guard. As part of these activities the howitzer exercises previously described are carried out.

After the exercises are completed, the troops and their equipment are normally embarked in the same manner as landed.

The amphibious exercises previously described usually take place throughout the year and in various degrees of complexity, involving from a score of men to various thousands of troops, and from one vessel to large supporting fleets. They can also be independent of other Naval activities or be part of "sequential" operations in which the different segments of a naval force (aircraft, ships and landings) are coordinated in a hopefully well-timed sequence.

C. The Naval Ammunition Facility (NAF)

As previously indicated, the NAF covers the entire portion of Vieques to the west of the civilian sector.

Before we discuss the principal activity in this area we should state that it contains a designated landing zone in the south western coast. This landing area is sometimes used for infiltration type exercises by small units.

The NAF is not properly a part of the Inner Range, although it may indirectly support its activities. It is a division of the weapons department of Roosevelt Roads and its main function is as a magazine for the storage of ammunition for

both ship-to-shore and air-to-ground firing.[14] The principal "client" of the NAF is of course Defendant Navy, but it also stores ammunition for the Puerto Rico Air and Army National Guard.

A link wire fence, again topped by barbed wire, separates the NAF from the civilian sector. It has two guarded gates and its perimeter is secured by roving patrols.

Ordnance is stored in 102 bunkers spread throughout the NAF, of which only 76 are presently in use. They are an average of 450 feet away from each other and are designed and built in such a manner that if one were to explode, no damage would occur to another magazine or any off-station location (from which the nearest is 2000 feet away).[15]

The bunkers are periodically inspected by several levels of supervision, as often as on a monthly basis. The last major inspection of the magazines was conducted by the Naval Sea Systems Command on May 15, 1978. No deficiencies were found.

The ammunition is landed in Vieques from civilian cargo ships docking at Mosquito Pier in the north coast. There is also an ammunition anchorage area off this sector for ships that may have to await approaching the dock.

Ammunition may be moved from the NAF to the GMA through the civilian sector. This consists of anything from 5.56 caliber small arms rounds up to 175 millimeter howitzer ammunition.[16] Eighty-one millimeter white phosphorous

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[14] This storage is referred to as "deep storage" because the ordnance is placed there not for trans-shipment, but to remain on location until withdrawn for use. This ammunition is for contingency use only. A small percentage is actually used on Vieques itself.

Only conventional ordnance is stored in Vieques, although some dynamite is also kept there for blasting in quarries. No poisonous gas or nuclear weapons are stored in Vieques.

[15] If a magazine with 30,000 pounds of explosives (a representative figure) were to explode, only minimal damage would be done to a building 1,250 feet away.

[16] In the last twelve months, there have been eight issues of ammunition to the Marines at Camp García and six issues to Cerro

smoke rounds are also occasionally moved to Cerro Matías. The ordnance is transported by pick-up trucks when it is small amounts, or in a larger truck when large amounts are involved, with an escort in front and in back. The ammunition-carrying vehicle is identified with a placard and red flags in accordance with Department of Transportation regulations. 49 C.F.R. 177.823. The boxes of ordnance are also marked with signs clearly signifying that they are mass detonating high explosives.[17] 49 C.F.R. 172.1 *et seq.* Prior to hauling ammunitions in a truck, the truck is inspected for 23 items by the driver. The drivers who haul ammunition are specially trained and tested. Only naval personnel who have been specially trained handle ordnance on Vieques.

Two overland routes are used to transport munitions from the NAF to the GMA. One is through the front gate on the north side of the Island and through Isabel Segunda. The second is through the back gate on the south side of Vieques, which route is used most frequently because it passes through areas with fewer people and less traffic.

There has not been any known accident from handling ammunition on Vieques.

We thus arrive to the legal issues raised by Plaintiffs' complaints.

IV. The Legal Issues

A. Preliminary Questions Raised By Defendant Navy's Motion To Dismiss

Shortly before the commencement of trial Defendant Navy filed a Motion to Dismiss. Because of the tardiness of

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Matías. The last movement of 155 or 175 millimeter ammunition to Camp García was on March 12, 1976.

[17] Mass detonating high explosives are those which detonate instantaneously if ignited. They are known as Class A explosives and carried in accordance with Department of Transportation regulations. 49 C.F.R. 173.1 *et seq.* We note that transportation of hazardous material apply only to carriers in commerce, see: 49 U.S.C. §§1801 *et seq.*; 49 C.F.R. 171.1.

this filing the Court decided to take it under advisement and allow opposing counsel to file opposition thereto. No opposition was in fact filed, although some of the issues were covered by Plaintiffs Romero-Barceló et al. in their brief.[18]

(1) The party defendants

All complaints except that of Plaintiff Fundación, attempt to state claims against Defendants in their individual as well as official capacities. These complaints however, are silent as to the personal involvement of any of these Defendants, nor do they specify what claims are stated against which Defendant in their individual capacities. The rule that constitutional and other claims against government officials in their individual capacities must be pleaded with specificity has thus been violated. *Rotolo* v. *Borough of Charleroi,* 532 F.2d 920, 922 (C.A. 3, 1976).

Furthermore, it is well established that Federal officials are not vicariously liable for the acts of their subordinates, *Black* v. *United States,* 534 F.2d 524, 528 (C.A. 2, 1976), and Plaintiffs must show a direct involvement or responsibility on the part of each of the named Defendants in the action of which they complain. *Rizzo* v. *Goode,* 423 U.S. 362, 371, 375-376, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).

On all these counts Plaintiffs have failed and thus the actions against Defendants as individuals must be dismissed.

The allegations in Plaintiffs Medina et al's complaint against "John Doe" and "Unknown Federal Agents" must also be dismissed as there is no provision in the Federal Rules of Civil Procedure for suit against persons under fictitious

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[18] Plaintiffs Medina et al. and Zenón et al. have in fact refused to file any post trial brief or proposed findings, all in violation of specific orders of this Court. These Plaintiffs, who were allowed to litigate *in forma pauperis* and supplied with daily copy of the trial record at considerable public expense, sought voluntary dismissal without prejudice after the trial had ended. This action which we consider to have been taken in bad faith by said Plaintiffs, was denied by the Court.

names. See: Rules 4(d)(1); 10(a), 17(a) Fed.R.Civ.P.; *McDonald* v. *General Mills, Inc.*, 387 F.Supp. 24, 33 (E.D.Cal., 1974).

(2) The actions that seek damages for allegedly tortious conduct

Although the United States is not named as a party Defendant, the various nuisance and tort claims are in reality claims against the sovereign. In determining this, we are not bound by the naming of individual Defendants nor by Plaintiffs' characterization of the suit. *Sportique Fashions, Inc.* v. *Sullivan*, 421 F.Supp. 302, 305 (N.D.Cal., 1976). Pursuant to *Dugan* v. *Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), a suit is deemed to be against the sovereign if the judgment would expend itself on the public treasury or interfere with public administration. See also *Smith* v. *Grimm*, 534 F.2d 1346, 1351 (C.A. 9, 1976), cert. den. 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976). These claims have precisely that effect, particularly where there is no allegation or proof that any of Defendants took any action beyond the scope of their authority. They thus qualify for absolute immunity as to common law torts and statutory claims under *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959); *Howard* v. *Lyons*, 360 U.S. 593, 79 S.Ct. 1331, 3 L.Ed.2d 1454 (1959); *Sportique Fashions*, supra, at 305-306; as the import of these claims would only fall upon the United States. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Minnesota* v. *United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939); *Commonwealth of Mass.* v. *U.S. Veteran's Administration*, 541 F.2d 119 (C.A. 1, 1976).

It is elementary that the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.*, constitutes an express, but limited waiver of sovereign immunity. Although negligent actions of government agents constituting a common law tort may be sued upon, intentional torts are specifically excluded from this waiver. 28 U.S.C. §2680(a), (h). See *Dalehite* v. *United States*,

346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). Claims against the Government based upon the concept of nuisance however, are included. *In Re: Silver Bridge Disaster Litigation,* 381 F.Supp. 931, 967 (S.D.W.Va., 1974). But the statute specifically requires an initial presentation of the claim to the appropriate federal agency and a final denial by that agency as a prerequisite to suit. 28 U.S.C. §2675. This requirement is jurisdictional and cannot be waived. *Bialowas* v. *United States,* 443 F.2d 1047, 1049 (C.A. 3, 1971); *Collazo* v. *United States,* 372 F.Supp. 61 (D.P.R.1973). Plaintiffs have made no allegation nor presented any evidence to show compliance with this prerequisite.

The consequence of this situation is that the nuisance claims of Plaintiffs Romero Barceló, et al, Zenón et al and Medina et al, to the extent they may be interpreted as seeking damages, and the intentional and/or negligent conduct counts of Plaintiffs Medina et al's complaint, must be dismissed for lack of jurisdiction.

(3) Plaintiffs Medina et al "taking" claims

Plaintiffs Medina et al claim that they have been deprived of their property without just compensation when agents of the United States purchased a large number of private tracts in Vieques in "about 1941", which tracts are now part of the lands used by Defendant Navy. Here again we see that the real party is the United States and not the named individual Defendants.

With the exception of one Plaintiff, Angel Ventura, none of the other Plaintiffs have any standing to sue as they do not even allege to have been "deprived" property owners.[19] In any event, these claims are subject to the provisions of the

[19] Class certification "of all those persons who, at the time of the Navy occupation of the Island of Vieques, in or around 1941, and thereafter, onwed (sic) property, and were deprived of that property due to illegal actions of the United States Navy", was never granted. See *Romero Barceló* v. *Brown,* 78 F.R.D. 531, 532 (D.P.R., 1978).

Tucker Act, 28 U.S.C. §§1346(a)(2), 1491, under which the Plaintiffs would have to sue. *Dow* v. *United States,* 357 U.S. 17, 21, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958).

The statute of limitations under this legislation is six years measured from the time when the cause of action first accrues against the Government. 28 U.S.C. §2501. *Camacho* v. *United States,* 494 F.2d 1363, 204 Ct.Cl. 248 (1974); *Castro* v. *United States,* 500 F.2d 436, 205 Ct.Cl. 534 (1974). The time of taking is the date when the United States first enters into possession or files a declaration of taking, whichever is earlier. *Dow* v. *United States,* supra. Thus the time for filing a suit against United States would have expired in "about 1947", and a suit filed in 1978, as in the present case, is absolutely time barred. See *Camacho* v. *United States,* supra.

B. The Federal Water Pollution Control Act

Plaintiffs' claims under the Federal Water Pollution Control Act (33 U.S.C. §§1251-1376, as amended), referred to in this Section as the "Act", fall into two categories: (1) that Defendant Navy is required to obtain a National Pollution Discharge Elimination System (NPDES) permit for its discharge of sewage at Camp García and for the alleged discharge of ordnance from ships and planes which fall into the sea surrounding Vieques; (2) that the Defendant Navy is violating various Puerto Rican laws incorporated by reference into this Act (see 33 U.S.C. §1323).

The uncontroverted evidence presented, including the testimony of the President of Plaintiff Environmental Quality Board, clearly establishes that Defendant Navy no longer discharges treated sewage effluent from its plant at Camp García into the waters surrounding Vieques.[40] This operation

[40] In contrast we should note that the Municipality of Vieques is one of 25 coastal municipalities in Puerto Rico that still discharge municipal wastes directly into the coastal zone, and is considered by Plaintiff Environmental Quality Board to "be a major source of pollution." (See *Exhibit CRB 400A,* page 95). These wastes reach coastal waters "relatively undiluted and without having been completely broken down biologically."

has been converted to a land discharge, for which no permit is required under the Act.

As to the discharge of sewage by Defendant Navy's vessels into the surrounding sea, although there is no direct evidence presented of this taking place, the nature of Defendant Navy's operations make this a distinct possibility. The evidence is however, that with the exception of landing barges, these vessels operate beyond the three-mile limit, which is the maximum geographical coverage of the Act. 33 U.S.C. §1362(7), (8) and (12). Furthermore, the Secretary of Defense has exempted these vessels from marine sanitation requirements pursuant to authority conferred by the Act. 33 U.S.C. §1322(d).[41]

It is our opinion that the majority of the ordnance that falls into the waters surrounding Vieques does so by chance, although it appears that this may happen with some frequency in the waters in the immediate vicinity of Bahía Icacos and Bahía Salinas del Sur in the AIA/CAS/NGFS zones. Furthermore, as previously stated, a water target exists east of Punta Este which lies within the "territorial seas." 33 U.S.C. §1362(8).

We must decide whether these accidental bombings of the navigable waters, and the occasional intentional bombing of the water target, require that Defendant Navy obtain a NPDES permit.

The conduct that requires an NPDES permit is "the *discharge* [or runoffs] of any pollutants" (emphasis added),

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[41] The Secretary has promulgated regulations which exempt these vessels from the provisions for marine sanitation until April, 1981 (Department of Defense Directive Number 6050.4, April 28, 1976; see also: 40 C.F.R. 140.3(b). The regulations also exempt vessels totally, ". . . while conducting or participating in military operations and exercises [including training and readiness exercises and operations], within the navigable waters of the United States . . ." Department of Defense Directive Number 6050.4, April 28, 1976, part VIII(B)(2).

33 U.S.C. §1311(a), §1323(a). The term "discharge of any pollutant" means:

> ". . . (A) any addition of any *pollutant* to navigable waters from any *point source*.
>
> (B) any addition of any *pollutant* to the waters of the contiguous zone or the ocean from any *point source* other than a vessel or other floating craft." (Emphasis added). 33 U.S.C. §1362(12).

"Pollutant" is defined as:

> ". . . dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage *sludge, munitions,* chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water. . . ."

"Point source" in turn is defined as:

> "*any* discernible, confined and discrete *conveyance,* including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, *from which pollutants are or may be discharged*. . . ." (Emphasis supplied) 33 U.S.C. §1362(14).

It would be a strained construction of unambiguous language for the Court to interpret that the release or firing of ordnance from aircraft into the navigable waters of Vieques is not ". . . any addition of any pollutant . . . from any point source . . .", particularly in view of the broad rather than narrow interpretation given to this type of statute, *United States* v. *Standard Oil Co.,* 384 U.S. 224, 86 S.Ct. 1427, 16 L.Ed.2d 492 (1966); *United States* v. *Republic Steel Corp.,* 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960); *Minnehaha Creek Watershed District* v. *Hoffman,* 597 F.2d 617, 625 (C.A. 8, 1979); *United States* v. *Hamel,* 551 F.2d 107, 112 (C.A. 6, 1977); *United States* v. *Ashland Oil and*

Transportation Co., 504 F.2d 1317, 1328-1329 (C.A. 6, 1974). We are forced to so conclude notwithstanding the fact that the agency charged with administration of this Act, the Environmental Protection Agency, does not appear to have any regulation which provides for the issuance of a NPDES permit under circumstances such as herein presented, and further notwithstanding that we find that no credible evidence was presented to the Court to the effect that any of the materials deposited in the waters surrounding Vieques as a result of the aforementioned activities has had any measurable deleterious effects on the environment, or on the quality of the surrounding waters, from a scientific vis-à-vis legal standpoint. Nevertheless, we hold that as the Act now reads, Defendant Navy is required to have an NPDES permit to cover the accidental or intentional release or firing of ordnance into the areas herein discussed. *Train* v. *Colorado Public Interest Group,* 426 U.S. 1, 7, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976); *E.P.A.* v. *State Water Resources Control Board,* 426 U.S. 200, 205, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976).

The second aspect of this issue is called into play by the provisions of 33 U.S.C. §1323(a), which states:

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and *to the same extent as any nongovernmental entity* including the payment of reasonable service charges. . . ." (Emphasis added).

It is the contention of Plaintiffs that accidental and intentional ordnance dropping into the water areas previously indicated violates various Puerto Rican legislation, namely the

Water Pollution Control Act (24 L.P.R.A. §591 et seq.) the Public Policy Environmental Act (12 L.P.R.A. §1121, et seq.) and the Water Pollution Control Regulation, promulgated thereunder.

The Public Policy Environmental Act, supra, is a statute which, as the title implies, generally sets out the Commonwealth's environmental posture and establishes the Environmental Quality Board to administer it. There is little of a specific nature in this statute on which we can hang our legal hat for purposes of the present issue.

It is in the Water Pollution Control Act, supra, that we find a specific relevant prohibition (24 L.P.R.A. §595):

> "It shall be unlawful for any person, directly or indirectly, to throw, discharge, pour, or dump, or permit to be thrown, discharged, poured or dumped into the waters, any organic or inorganic matter capable of polluting or of leading *to the pollution* of said waters in such manner as to place them out of the *minimum standards of purity* that the [Environmental Quality Board][42] may establish under section 599 of this title." (Emphasis supplied).

That statute defines "pollution" as follows: (24 L.P.R.A. §591(i):

> " 'To pollute', with reference to *waters,* means *making them in any way noxious* to human health, or to that of animals, vegetables or fish, or rendering them ill-smelling or impure, all *according to the permissible standards of purity or impurity* heretofore or hereinafter established as provided herein. 'Pollution' has this same meaning." (Emphasis supplied).

"Discharge" is defined as (24 L.P.R.A. §591(j)):

> ". . . [T]he terminal of a sewer system, large or small, collective or individual, or of a discharge of industrial

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[42] 12 L.P.R.A. §1132(b).

refuse or any other kind of refuse, where it emerges to be dumped into the waters."

This language, together with that statute's definition of "sewage",[43] "industrial waste"[44] and "other[s]"[45] kinds of refuse leads us to conclude that the prohibited acts under the Puerto Rican legislation are narrower in scope than those under the "Act."

To begin with, upon reading this statute we are left with the clear impression that it is only meant to cover normal endeavors of human activity producing sewage and industrial water through pipes and similar devices, and not military operations of the type here in question.[46] Apart from that however, the activity has to either make the water noxious to humans, animals, etc. or violate specific standards of water purity.

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[43] "*Sewage, sewer water,* mean human and animal wastes, intestinal and others, dragged by water flowing from houses, residences, buildings, industrial establishments and other places, whether alone or mingled with surface or land waters. The mingling of industrial or other wastes with sewage or sewer waters shall be considered included under this term." (Emphasis in the original).

[44] "*Industrial waste* is any liquid, gaseous, or solid refuse, or a combination of all, resulting from any industrial, manufacturing, commercial or business process, or from the processing of any raw material or natural wealth." (Emphasis in the original).

[45] "*Others,* in connection with wastes, include garbage, residues, rotten wood, sawdust, filings, lime, ashes, offals, oil, dyes, acids, chemical substances and any other substance that may pollute or cause the pollution of waters." (Emphasis in the original).

[46] This is reinforced by the definition of "harmful substance" and "spillage" contained in the Public Policy Environmental Act (12 L.P.R.A. §1141(c) and (d):

> "'Harmful substance' — Those substances which by their nature may, in the event of spillage, cause damage to the environment, including, but without being limited to, substances such as petroleum and its derivatives." "Spillage" — Discharge, emission or expelling, whether accidental or intentional, of harmful substances from any kind of ship through pipelines or by any other means, into high seas or other bodies of water in Puerto Rico."

We have already stated that no credible evidence was adduced establishing that the activities of Defendant Navy have made the *water* noxious. Thus assuming it was the intention of the Puerto Rican Legislature to apply this statute to the naval operations of the Defendant Navy in Vieques, we must look to the regulations to determine whether a standard of purity established thereunder has been violated.

Plaintiffs rely on the applicability of the "Water Quality Standards Regulations" of Plaintiff Environmental Quality Board.[47] This regulation is intended to promulgate water quality standards for the coastal and surface waters of Puerto Rico, (Art. 3.), and prohibits the pollution[48] of these waters (Art. 4.1.1) or the discharge of any water pollutant (Art. 4.1.2).

The water quality standards are the following:

"2.1 *General* water quality standards.

All waters shall meet generally accepted aesthetic qualifications and shall be capable of supporting

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[47] According to this document, the regulation was filed in the Department of State of the Commonwealth of Puerto Rico on January 4, 1974, and later amended in May, 1974 and October, 1976. The Political Code of Puerto Rico provides (3 L.P.R.A. §1046) that regulations filed with the Department be published in two newspapers of general circulation and in the "Commonwealth of Puerto Rico Register" ("Boletin del Estado Libre Asociado de Puerto Rico"). It does not appear that this regulation or the amendments were ever published in the Register. The Department has discontinued publishing the Register since 1972 for alleged lack of funds. The prior regulation is found at 24 R & R 598-1 et seq., and is substantially different in parts from the regulation assumed to be in effect by all parties.

[48] The definition of "pollution" in the regulation is slightly different from that in the statute:

"Pollute (to), Pollution. Altering the natural characteristics of a body of water so as to make it in any way harmful or noxious to human health, or to that of animals, or plants, or rendering it ill-smelling or impure or altering adversely its physical, chemical, microbiological or radioactive condition, in such a way as to interfere with the standards of purity established by this Regulation." Art. 1.

diversified aquatic life. These waters shall, except as specifically noted, meet the following quality standards:

2.1.1 Solids and other matter. The waters of Puerto Rico shall not contain materials attributable to *discharges* that will settle to form objectionable deposits. Nor will they contain floating debris, scum, oil and other floating materials attributable to *discharges* in amounts sufficient to be unsightly or deleterious.

2.1.2 Color, odor, taste or turbidity. The waters of Puerto Rico shall be free from color, odor, taste or turbidates attributable to *discharges* in such a degree as to create a nuisance.

2.1.3 Substances in toxic concentrations thereof.

The waters of Puerto Rico shall not contain substances in concentrations or combinations which are toxic or which produce undesirable physiological responses in human, fish or other animal life, and plants.

A. *Specific standards* for some substances:

i) Coastal waters

The maximum allowable concentrations of certain substances in the receiving coastal waters shall be the following:

Substance	Limit (mg/l)
Arsenic (As)	0.15
Barium (Ba)	1.0
Boron (B)	4.8
Cadmium (Cd)	0.005
Carbon (Choloroform extract)	28.0
Chromium (hexavalent (Cr.)	0.05
Chromium (trivalent (Cr.)	0.30
Copper (Cu)	0.05
Cyanide (CN)	0.01
Detergents (Methylene Blue (Active Substances)	0.5
Fluorides (F)	1.3
Iron (Fe)	0.200
Lead (Pb)	0.015
Manganese (Mn)	0.100
Mercury (Hg)	0.001
Nitrogen (NO_3 NO_2 NH_3)	5.0
Phenols	.010
Selenium (Se)	0.01
Silver (Ag)	0.001
Sulfate ($S0_4$)	2800.
Uranil (UO_2)	0.500
Zinc (Zn)	0.050."

(Emphasis Supplied)

Defendant Navy makes much ado about the unconstitutional vagueness of these provisions. See *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); but

see: *Cerame Vivas* v. *Secretary of Health,* 99 P.R.R. 44 (1976). However, this is an issue we need not decide as this regulation is clearly inapplicable to Defendant Navy's operations presently at issue.

The key word in the quality standards reproduced above is "discharges." The regulation defines this term as follows:

> " 'Discharge (to), Discharge' — The outflow of *wastewater* from any domestic, commercial, industrial, agricultural or any other source into receiving waters." (Emphasis supplied). Art. I.

When we seek the definition of "wastewater" in the regulation we are referred to the definition of "municipal wastes", which states:

> "Water carrying human and animal wastes from homes, buildings, industrial establishments and other places alone or in combination with industrial wastes." (Art. I.)

We see no plausible way of interpreting the accidental or intentional bombing or sheltering of the coastal waters as falling within the proscribing language of the regulation. This of course, is in keeping with our prior interpretation of the language of the Statute which authorizes this regulation.

Furthermore, the record is barren of any credible evidence which would support a finding that Defendant Navy has conducted any activity violative of the specific standards of Article 2.1.3 Ai) of this Regulation or that the waters in question do not "meet generally accepted aesthetic qualifications" or are not "capable of supporting diversified aquatic life." In fact, if anything, these waters are as aesthetically acceptable as any to be found anywhere, and Plaintiffs' witnesses unanimously testified as to their being the best fishing grounds in Vieques.

C. The Marine Protection, Research And Sanctuaries Act

Plaintiffs' claim to the effect that Defendant Navy's activities violate the Marine Protection, Research and Sanctuaries Act, also known as the "Ocean Dumping Act", and referred to in this section as the "Act", 33 U.S.C. §1401 *et seq.*, are clearly without merit. It is Plaintiffs' contention that Defendant Navy's discharge of ordnance in the waters off Vieques as well as related activities during the course of military operations, constitute "dumping" which requires a permit from the Environmental Protection Agency, a permit which Defendant Navy lacks.

It cannot be disputed but that the complained of activities are incidental to military training exercises and that the purpose of Defendant Navy's activities are said exercises rather than the disposal of waste.

The definition of "dumping" contained in the Act excludes ". . . the intentional placement of any device in ocean waters or on or in the submerged land beneath such waters, for a purpose other than disposal, when . . . such placement . . . occurs pursuant to an authorized Federal . . . program." 33 U.S.C. §1402(f). This language, together with the legislative history of the Act, leave no doubt but that Congress intended to prohibit *purposeful disposal of waste.* See 1972 U.S. Code Cong. & Admin. News, pp. 4234 *et seq.* The report of EPA Administrator William D. Ruckelshaus specifically states:

> "Special note should also be made of the fact that 'dumping' as defined in subsection 3(f) would not include an activity which has as its primary purpose a result other than 'a disposition of material' but which involves the incidental depositing of some debris or other material in the relevant waters. *For example, material from missiles and debris from gun projectiles and bombs ultimately come to rest in the protected waters. Such activities are not covered by this Act."* Supra, p. 4255-6. (Emphasis supplied).

D. Allegations Under The Resource Conservation And Recovery Act

The allegations of Plaintiffs pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 *et seq.* hereinafter referred to in this section as the "Act" are equally without substance. A reading of this statute as well as its legislative history establishes beyond any question that congress' intended targets were the evils brought about by "solid wastes" and "hazardous wastes" as *therein* defined.[49] "Solid Waste" is defined as:

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[49] The Congressional findings contained in 42 U.S.C. §6901 are particularly illustrative of this point:

"(a) *Solid waste.* The Congress finds with respect to solid waste —

(1) that the continuing technological progress and improvement in methods of manufacture, packaging, and marketing of consumer products has resulted in an ever-mounting increase, and in a change in the characteristics, of the mass material discarded by the purchaser of such products;

(2) that the economic and population growth of our Nation, and the improvements in the standard of living enjoyed by our population, have required increased industrial production to meet our needs, and have made necessary the demolition of old buildings, the construction of new buildings, and the provisions of highways and other avenues of transportation, which, together with related industrial, commercial, and agricultural operations, have resulted in a rising tide of scrap, discarded, and waste materials;

(3) that the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas;

(4) that while the collection and disposal of solid waste should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid-waste disposal practices.

". . . [A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other *discarded material,* including solid, liquid, semisolid, or contained gaseous material

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(b) *Environment and health.* The Congress finds with respect to the environment and health that —

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

(3) as a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste; and

(6) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken;

(c) *Materials.* The Congress finds with respect to materials, that —

(1) millions of tons of recoverable material which could be used are needlessly burned each year;

(2) methods are available to separate usable materials from solid waste; and

(3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

(d) *Energy.* The Congress finds with respect to energy, that —

(1) Solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;

resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . ." (Emphasis supplied). See 42 U.S.C. §6903(27).

With one exception which will be presently discussed, it is obvious that Defendant Navy's military activities, although causing the incidental depositing of debris are not the discarding of material nor are they the result of an industrial, commercial, mining or agricultural operation.

"Hazardous waste" is in turn defined as:

"[A] *solid waste, or combination of solid wastes,* which because of its quantity, concentration or physical, chemical or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." (Emphasis supplied). See 42 U.S.C. §6903(5).

Even assuming that Plaintiffs have otherwise met the substantial burden placed upon them by sub-paragraphs (A) and (B) of this definition, a fact which is far from certain, the scope of this definition in referring to "solid waste", a term of art under this Act, excludes *military* hazardous wastes from its coverage.

Plaintiffs next rely on the "Regulation for the Control of Solid Waste" promulgated by Plaintiff Environmental Quality Board[10] Plaintiffs allege that this regulation is applicable to

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(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and

(3) technology exists to produce usable energy from solid waste."

See also 1976 U.S.Code Cong. and Admin. News, pp. 6238 *et seq.*

[10] See footnote 47.

Defendant Navy's activities by virtue of 42 U.S.C. §6961, which states:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any *solid waste management facility* or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal of *solid waste*, or *hazardous waste* shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) respecting control and abatement of *solid waste* or *hazardous waste* disposal in the same manner, and to the same extent, as any person is subject to such requirements, . . ." (emphasis supplied).

The military activities of Defendant Navy, with one exception, fall outside of the scope of this delegation. Within the Act's definition of the term "solid waste management facility" we find that it includes "any facility for the treatment of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise." 42 U.S.C. §6903(29). Considering this definition together with the definition of "solid waste", which as previously indicated, includes "discarded material. . . resulting from . . . *community activities* . . ." (emphasis supplied, 42 U.S.C. §6903(27), it becomes apparent that the Commonwealth's regulation is applicable to a single trench landfill operated by the Marines in Camp García for the disposal of food waste and packaging material. As to this, the evidence presented during the trial shows that on October 16, 1978, Defendant Navy applied to the Environmental Quality Board for a solid waste facility operating permit.

E. The Rivers and Harbors Act

Plaintiffs seek injunctive relief alleging that Defendant Navy has violated the Rivers and Harbors Act of 1899, 33 U.S.C. §§401 *et seq.*, hereinafter called the "Act" in this Section. More specifically, Plaintiffs claim that Defendant Navy has without a permit from the Corps of Engineers thrown, discharged or deposited refuse material in the navigable waters of the United States in violation of Section 13 of the Act (33 U.S.C. §407), and also without a permit, has sunk vessels and other craft in the vicinity of Vieques in violation of Section 15 of the Act (33 U.S.C. §409).

The short answer to these contentions is that Plaintiffs lack standing to sue for these alleged violations.

In differentiation to other statutes involved in this case,[11] the "Act" not only fails to provide for a private right of action to enforce its provisions, but in fact preempts the field in favor of *public* enforcement. Thus 33 U.S.C. §413 clearly and expressly mandates that:

> "The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of Sections 401, 403, 404, 406, *407*, 408, *409*, 411, 549, 686 and 687 of this title; . . ." (Emphasis supplied).

Plaintiffs rely on *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407

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[11] See e.g.: Section 505 of the Federal Water Pollution Control Act, 33 U.S.C. §1365; Section 11 of the Endangered Species Act, 16 U.S.C. §1540(g)(1); Section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. §6972; and Section 304 of the Clean Air Act, 42 U.S.C. §7604. Recently the Supreme Court has stated: "When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights." *Cannon* v. *University of Chicago*, _____ U.S. _____, at p. _____, 99 S.Ct. 1946 at p. 1967, 60 L.Ed.2d 560 (1979). Exceptions to Congress' failure to specify a private cause of action are both "limited" and "typical." Id. Here the language of Section 413 is indicative of legislative intent for public rather than private enforcement.

(1967), for the proposition that in addition to the criminal sanctions of this penal statute, they as private parties are allowed to seek injunctive relief for its alleged violation. But this case far from supporting this proposition concludes that it is the *United States* that has the right to injunctive relief in aid of protecting a public interest expressed in a statute containing criminal penalties for its violation. The Court there said (389 U.S. 201-202, 88 S.Ct. 385-386, citations omitted):

> "Article I, §8, of the Constitution grants to Congress the power to regulate commerce. For the exercise of this power, the navigable water of the United States are to be deemed the 'public property of the nation, and subject to all the requisite legislation by Congress.' The Federal Government is charged with ensuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain free of obstruction. The Rivers and Harbors Act of 1899, an assertion of the sovereign power of the United States, was obviously *intended to prevent obstructions in the Nation's waterways.* Despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad. And *we have found that a principal beneficiary of the Act, if not the principal beneficiary, is the Government itself.*
>
> "Our decisions have established, too, the general rule that the *United States* may sue to protect its interests. This rule is not necessarily inapplicable when the particular government interest sought to be protected is expressed in a statute carrying criminal. penalties for its violation. Our decisions in cases involving civil actions of private parties based on the violation of a penal statute so indicate. In those cases we concluded that criminal liability was inadequate to insure the full effectiveness of the statute which Congress had intended. *Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were*

proper. That conclusion was in accordance with a general rule of the law of torts. We see no reason to distinguish the Government, and to deprive the *United States* of the benefit of that rule.

"The inadequacy of the criminal penalties explicitly provided by §16 of the Rivers and Harbors Act is beyond dispute. That section contains only meager monetary penalties. In many cases, as here, the combination of these fines and the Government's *in rem* rights would not serve to reimburse the *United States* for removal expenses. It is true that §16 also provides for prison terms, but this punishment is hardly a satisfactory remedy for the pecuniary injury which the negligent ship owner may inflict upon *the sovereign.*" (Emphasis supplied).

It is clear that this case does not support Plaintiffs' standing under the Act to seek *private* injunctive relief. See *Cort* v. *Ash,* 422 U.S. 66, fn. 11, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1974); *Cannon* v. *University of Chicago,* supra at fn. 13 and (J. Powell, dissenting) fn. 3.

We decline the invitation to follow *Natural Resources Defense Council Inc.* v. *Grant,* 355 F.Supp 280 (E.D.N.C., 1973) and *People of State of Illinois ex rel. Scott* v. *Hoffman,* 425 F.Supp. 71 (S.D.Ill., 1977), as in our opinion they run contrary to the controlling language of 33 U.S.C. §413 and to the greater weight of authority. The Second, Third, Fourth, Fifth, and Seventh Circuits have all expressed themselves as finding no private causes of action under different sections of the Rivers and Harbors Act, see: *Connecticut Action Now, Inc.* v. *Roberts Plating Co.,* 457 F.2d 81 (C.A. 2, 1972); *Red Star Towing & Transportation Co.* v. *Department of Transportation,* 423 F.2d 104, 105 (C.A. 3, 1970); *Hughes* v. *Ranger Fuel Corp.,* 467 F.2d 6, 8 n. 1 (C.A. 4, 1972);[12]

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[12] The Fourth Circuit may have implicitly recognized such a right by affirming three lower court decisions without discussion on this point, see: *Rucker* v. *Willis,* 358 F.Supp. 425 (E.D.N.C.1973) aff'd 484 F.2d 158 (1973); *River* v. *Richmond Metropolitan Authority,*

Guthrie v. *Alabama By Products,* 456 F.2d 1294 (C.A. 5, 1972) cert. den. 410 U.S. 946, 93 S.Ct. 1352, 35 L.Ed.2d 613 (1973);[13] *Jacklovich* v. *Interlake, Inc.,* 458 F.2d 923 (C.A. 7, 1972). Besides *Grant,* supra, and *Hoffman,* supra, only the Ninth Circuit in *Riggle* v. *State of California,* 577 F.2d 579, 582-583 (C.A. 9, 1978),[14] and in two lower court decisions, *Sierra Club* v. *Morton,* 400 F.Supp. 610, 622-623 (N.D.Cal.1975); *Sierra Club* v. *Leslie Salt Co.,* 354 F.Supp. 1099, 1104-05 (N.D.Cal.1972), have recognized private causes of action under this "Act." All other lower court case law is decidedly against recognizing such a right. *Township of Long Beach* v. *City of New York,* 445 F.Supp. 1203 (D.N.J.1978); *Loveladies Property Owners Ass'n* v. *Raab,* 430 F.Supp. 276, 281 (D.N.J.1975) aff'd unreported decision, 547 F.2d 1162 (C.A. 3 1976) cert. den. 432 U.S. 906, 97 S.Ct. 2949, 53 L.Ed.2d 1077 (1977); *Parsell* v. *Shell Oil Co.,* 421 F.Supp. 1275 (D.Conn., 1976); *Burgess* v. *M/V Tamano,* 373 F.Supp. 839, 845 (D.Me., 1974); *Gerbing* v. *I.T.T. Rayonier Incorporated,* 332 F.Supp. 309 (M.D.Fla.1971); *Hooper* v. *United States,* 331 F.Supp. 1056, 1058 (D.Conn.1971); *Bass Anglers Sportsman's Society* v. *Scholze Tannery Inc.,* 329 F.Supp. 339 (E.D.Tenn.1971); *United States ex rel. Mattson* v. *Northwest Paper Company,* 327 F.Supp. 87 (D.Minn.1971); *Enquist* v. *Quaker Oats Company,* 327 F.Supp. 347 (D.Neb. 1971); *Bass Anglers Sportman's Society* v. *Plywood Champion Papers, Inc.,* 324 F.Supp. 302 (S.D.Tex.1971); *Bass Anglers Sportsman Society* v. *United States Steel Corp.,* 324 F.Supp. 412 (N.D., M. D., and S. D. Ala.1971) aff'd. 447 F.2d 1304

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359 F.Supp. 611 (E.D.Va.1972) aff'd. 481 F.2d 1280 (1973); *Lauritzen* v. *Cheasapeake Bay Bridge and Tunnel District,* 259 F.Supp. 633 (E.D.Va. 1966) aff'd 404 F.2d 1001 (1968).

[13] But cf.: *Neches Canals Co.* v. *Miller & Vidor Lumber Co.,* 24 F.2d 763 (C.A. 5, 1928) with *Intercoastal Transportaion, Inc.* v. *Decatur County, Georgia,* 482 F.2d 361 fn. 14 (C.A. 5, 1973).

[14] Cf. also: *Alameda Conservation Association* v. *California,* 437 F.2d 1087 (C.A. 9, 1971), cert. den. 402 U.S. 908, 91 S.Ct. 1380, 28 L.Ed.2d 649 (1971).

(C.A. 5, 1971); see also: *H. Christiansen & Sons, Inc.* v. *City of Duluth*, 154 F.2d 205 (C.A. 8, 1946). Contra see: *Potomac River Association, Inc.* v. *Lundeberg Maryland Seamanship School, Inc.*, 402 F.Supp. 344 (D.Md. 1975).

While we hold that sounder law dictates a finding that no private cause of action is created by the Rivers and Harbors Act, as is clear from the above citations, we are not unmindful of the division of authority on this point. As mentioned Plaintiffs specifically allege violations under Sections 13 and 15 of this Act, 33 U.S.C. §§407, 409. Section 13 of this Act, also commonly known as the "Refuse Act" generally prohibits the "discharge, or deposit, [of] . . ., any refuse matter of any kind or description . . ., into any navigable water of the United States" without a permit from the Secretary of the Army. It may be true that Defendant Navy's release of ordnance in the navigable waters surrounding Vieques could constitute "refuse matter" under Section 407. *United States* v. *Standard Oil*, 384 U.S. 224, 86 S.Ct. 1427, 16 L.Ed.2d 492 (1966); *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960). But even so assuming any relief that we could enter for this violation would be only superfluous and cumulative. We have hereinbefore found that under the Federal Water Pollution Control Act the Defendant Navy must secure a permit for the release or firing of ordnance into the surrounding waters. An NPDES permit under the pollution act is the same permit required under Section 407 of the Rivers and Harbors Act, see: 33 U.S.C. §1342(a)(4), (5). Relief entered under the pollution act and any relief that might be entered under Section 407 would necessarily be identical.

Plaintiffs also argue that Defendant Navy is in violation of Section 409 of this Act. Said Section makes it unlawful

> ". . . to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily, or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; . . ."

Plaintiffs' contention in this regard centers on the sinking of the U.S.S. Killan, a landing barge, in the waters of Vieques. See n.29, supra. The short answer to these allegations is that the record contains no evidence establishing any obstruction to navigation or that any other vessels plying these waters are endangered by this. In fact the state of this vessel is such as may be classified as "broken up", cf. 33 U.S.C. §414, and constitutes no safety hazard. Moreover, the environmental effects of this sinking, if any, are essentially minimal.

F. Claims under the Federal Clean Air Act

Plaintiffs Romero Barceló, et. al., Medina, et al., and Zenón, et al., claim that Defendant Navy's activities violate the Federal Clean Air Act, 42 U.S.C. §7401 *et seq.* (hereinafter called the "Act" in this Section) and Executive Order 11752. It is alleged that this statute requires that the departments of the executive branch of the Federal government comply with local requirements regulating the control and abatement of air pollution, but that Defendant Navy's activities, particularly the use of ordnance and the bulldozing and maintenance of unpaved roads, violate the "Regulation for the Control of Atmospheric Pollution" promulgated by the Plaintiff Environmental Quality Board, especially as related to so-called "fugitive dust."

It cannot be seriously questioned but that, under appropriate circumstances, the Act requires the Federal Government to comply with State substantive and procedural requirements related to air pollution 42 U.S.C. §7418(a) (West Supp.1977).[11] *People of State of Cal., etc.* v. *Dept. of Navy*,

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[11] This provision states:

"Each department, agency and instrumentality of the executive . . . branch[es] of the Federal Government (1) having jurisdiction over any property or facility or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent or employee thereof, shall be subject to, and comply with, all . . . State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution

431 F.Supp. 1271 (N.D.Cal.1977). The issue is whether the matters claimed herein are such an appropriate circumstance.

The regulation in question[56] states that ". . . [n]o person shall cause or permit air pollution as defined in Article 1." Art. 2.1.1. "Air pollution" is defined as:

> "The presence in the outdoor atmosphere of one or more *air pollutants in such quantities and duration* as is or could be injurious to human health or welfare, animal or plant life, or property, or which interferes with the enjoyment of life or property." (Emphasis supplied). Art. 1.

"Air pollutant" includes:

> "Dust, fumes, mist, smoke, other particulate matter, vapor, gas odorous substances, or any combination thereof, but not including uncombined water vapor." Art. 1.

As to "fugitive dust" the regulation states that it is:

> "Solid airbone (sic) particulate matter from any source other than through a stack."

Article 5.2.4, which specifically deals with fugitive dust, states:

> "No person shall cause or permit any materials to be handled, transported or stored; or a building, its ap-

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in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable."

[56] We are faced with a problem respecting this regulation similar to that discussed in Footnotes 47 and 49.

purtenances, or a road to be used, constructed, altered, repaired or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne. . . ."

Another section of this regulation requires that:

"No person shall cause or permit the discharge of visible emissions of fugitive dust beyond the lot line of the property on which the emissions originate." (Art. 5.2.2).

In our opinion nothing but sheer speculation would support a finding that Defendant Navy's emissions of "fugitive dust" are "in such quantities and duration as is or could be injurious to human health or welfare, animal or plant life or property." Although Defendant Navy's activities undoubtedly produce "dust, fumes . . .[and] smoke . . ." in what we consider to be relatively limited amounts [57] and of short duration, Plaintiffs fall considerably short of their burden in having failed to show in any convincing fashion any deleterious effect to humans, or otherwise, of the "fugitive dust" caused by the objected activities of Defendant Navy, much less that there are "visible emissions . . . beyond the lot line of the property on which the emissions originate."

In fact the "hard" evidence is to the contrary. Although the Environmental Protection Agency inspected the Camp García facility on November 1977, and March 1978 for air pollution matters, no "fugitive dust" was noted as a problem in either report. Existing studies by Plaintiff Environmental Quality Board (EQB) show no violation of the federal standards for 24-hours maximum allowable concentration of particulate matter in either Isabel Segunda or Esperanza. A nineteen-day study in 1972 conducted by the EQB in Isabel Segunda, found the background level for particulate matter at 80 micrograms per cubic meter, far less than the allowable concentration, which is 150 microgram per cubic meter, or than the national secondary standard for 24-hour maximum

[57] Based on observation by the Court of bombing runs, as well as photographs introduced in evidence.

allowable concentration, which is 150 micrograms per cubic meter. Furthermore, the measurements of sulfur dioxide, nitrogen oxide, ozone, hydrocarbons and particulates did not show any violation of national ambient air quality standards in either Isabel Segunda or Esperanza. Another sampling conducted by the E.Q.B. at Esperanza throughout May 25-June 6, 1978, showed a average of 99 micrograms per cubic meter at Esperanza as compared to only 25.9 microgram per cubic meter at the impact area, again in neither case exceeding the 24-hour maximum allowable concentration.

Of course, we have throughout this discussion been assuming that Plaintiffs are on sound footing procedurally, a situation which unfortunately for Plaintiffs, is not the case. Although for many sources of air polluting emissions the states are allowed to continue enforcing their own laws and regulations (42 U.S.C. §7416),[11] a citizen's suit such as the present one under the provisions of 42 U.S.C. §7604(a), must be based on the violations of a *specific* emission *standard or limitation. Citizens for Clean Air, Inc.* v. *Corps. of Engineers*, 356 F.Supp. 14 (S.D.N.Y.1973).

This section provides that:

> "(a) . . .[A]ny person may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or *limitation* under this chapter or (B) an order issued by the Administrator or a State with respect to *such a standard or limitation* . . ." (Emphasis supplied).

[11] In its pertinent parts this section reads as follows:

> "[N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce
>
> (1) any standard or limitation respecting emissions of air pollutants or
>
> (2) any requirement respecting control or abatement of air pollution. . . ."

Under 42 U.S.C. §7604(f) "emission standard or limitation" is defined as:

> ". . . (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,
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> (2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or
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> (3) any condition or requirement of a permit . . . any condition or requirement . . . (relating to certain enforcement order) . . . any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, . . . (relating to fuel and fuel additives) . . . [and] (relating to visibility protection), any condition or requirement . . . (relating to ozone protection) or any requirement . . . (without regard to whether such requirement is expressed as an emission standard or otherwise).

This definition does not incorporate a local regulation such as the one here in question dealing with "fugitive dust" and which in fact contains no quantitative limitation. Therefore, no citizens suit lies under the Act for enforcement of the regulation in question. *Citizen for Clean Air, Inc.* v. *Corps of Engineers, U.S. Army*, supra.

G. The Noise Control Act claims

It is the contention of Plaintiffs that Defendant Navy's military activities (shelling, bombing, artillery practice and aircraft and helicopter overflights) "generate noise [and shock waves] that unreasonably interfere[s] with the welfare of the residents on the island" in violation of the Noise Control Act of 1972, 42 U.S.C. §4901 *et seq.*, referred to as the "Act" in this section.

This Statute directs Federal agencies, "to the fullest extent consistent with their authority" to carry out the programs within their control in such a manner as to further the Act's

noise abatement policies, namely, ". . . to promote an environment for all Americans free from noise that jeopardizes their health or welfare." See 42 U.S.C. §§4901, 4903(a). The Act requires that:

> "Each department, agency or instrumentality of the executive, legislative, and judicial branches of the Federal Government —
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> (1) having jurisdiction over any property or facility, or
>
> (2) engaged in any activity resulting, or which may result, in the emission of noise, shall comply with Federal, State, interstate and local *requirements respecting control and abatement of environmental noise* to the same extent that any person is subject to such requirements . . ." (See 42 U.S.C. §4903(b)). (Emphasis supplied).

Executive Order 11752 (38 Fed.Reg. 34793, Dec. 17, 1973) in substance requires this same action from Federal agencies.

Plaintiffs' principal reliance for their contentions is placed on Puerto Rico's criminal nuisance statute, 33 L.P.R.A. §1365, which states that:

> "Anything which is injurious to health, or is . . . offensive to the senses, or is an obstruction of the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons . . . is a public nuisance."

For reasons that are not clear to us, Plaintiffs make no mention of Puerto Rico's civil nuisance law, found at 32 L.P.R.A. §2761, which would seem to have more relevance than the cited criminal law. The language of this statute is somewhat similar to the penal law:

> " Anything which is injurious to health, . . . or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of

an action. Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered; nothing herein provided shall apply to activities related to public worship in churches practiced by different religions; Provided, That the provisions herein established shall not be construed as a limitation of the powers of the Environmental Quality Board to promulgate regulations, as it is authorized by law."

In any event, in our opinion neither the penal or the civil nuisance statutes can be considered as establishing "requirements respecting control and abatement of environmental noise." This language of the Act together with the legislative history of 42 U.S.C. §4903(b) contemplates compliance with *specific standards* existing or to be promulgated by the various jurisdictions. Thus Senate Report No. 92-1160 speaks in terms of "authority to establish and enforce *limits* on environmental noise" and the authority of the ". . . States and local governments . . . *to* . . . *reach or maintain levels* of environmental noise which they desire through (a) operational limits or regulations on products in use . . .; (b) quantitative limits on environmental noise in a given area which may be enforced against any source within the area . . . (c) regulations limiting the environmental noise which may exist at the boundary of a construction site; (d) nuisance laws; or (e) other devices tailored to the needs of differing localities and land uses . . . ." (Emphasis supplied, see 1972 U.S.Code Cong. and Admin.News pp. 4655, 4660).

Conversely, in interpreting the civil nuisance statute the Supreme Court of Puerto Rico held in *Arcelay* v. *Sánchez* 77 P.R.R. 782 (1955), that there are no fixed norms for making a determination of whether a nuisance exists but rather that the resolution of the problem must be decided on a case by case basis, the fundamental question being whether or not the use by the defendant of his property is reasonable, bearing in

mind the right of the complainant to enjoy his own property.[59]

Shortly before the end of the trial, Plaintiff Environmental Quality Board promulgated a "Regulation For The Prevention and Control of Noise Pollution", pursuant to authority conferred under the Public Policy Environmental Act of Puerto Rico (12 L.P.R.A. §1121, *et seq.* at §1131(12)). Although it contains specific noise standards this regulation did not come into effect until after the trial ended.[60]

Irrespective of the above discussion, even under the most liberal interpretation of the Puerto Rican nuisance statute or the quoted noise regulation, Plaintiffs have failed to establish facts attributable to Defendant Navy justifying a conclusion that it is generating noise and shock waves of such magnitude as to interfere with either the health or property of the civilian residents of Vieques. On this issue the Court not only received extensive expert and lay testimony, but conducted a site inspection during actual bombing of the range, for the specific purpose of perceiving subjective sound impressions. In this respect the Court was present on four different locations: the observation post at Cerro Matías, (located approximately 2-3000 yards from the impact points), and three civilian sites, Colonia Luján, (about 9 miles away) the town square at Isabel Segunda, (about 10 miles distant) and Barrio Santa María (approximately 8 miles distant). During these listening periods the Court was accompanied by experts of all the parties, who had suitable measuring and recording instruments.

Suffice it to say that even during the bombing runs while at the observation post at Cerro Matías, the aircraft-

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[59] We need not decide whether these statutes run afoul of Defendant Navy's challenge on the basis of overbroadness and vagueness. *Cf. Smith* v. *Goguen,* 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *Connally* v. *General Construction Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

[60] The regulation was filed with the Secretary of State on November 24, 1978. Pursuant to its own terms it became effective 30 days *after* said filing, i.e., after the trial ended. See Art. 7.4. See also footnote 47.

connected sound were "negligible", while this time same activity was at best "barely audible"at the Barrio Santa María location.

The sounds of the bombs landing can of course be clearly heard from the observation post. These varied from an instrument recorded 128 decibels (dB) sound, involving the dropping of one MK-82 (500 pounds) bomb, to a high of 137 dB from twenty MK-82 (500 pounds) bombs, which did cause shockwave-induced rattling in the observation post's windows.

The sounds of explosions were not discernible to the human ear from any of the three civilian locations. Although they could be recorded with the aid of instruments at Luján and Santa María, they were completely inaudible, even by instruments, from the central Plaza at Isabel Segunda.[61] At Luján, using the peak flat sound pressure level (peak flat SPL) scale,[62] with an ambient level[63] of between 83 to 93 dB,

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[61] This was so even during the times when the nearby church is not blasting its message through its loud speakers, a "nuisance" excluded from coverage of the law by virtue of the proviso in 32 L.P.R.A. §2761. *Cf. Sucn. de Victoria* v. *Iglesia Pentecostal*, 102 D.P.R. 20 (1974).

[62] It has been customary to describe the magnitude of the sound of an explosion by the *peak sound pressure level* as received in a wide frequency band. The four elements are (1) *peak*, signifying the greatest instantaneous sound pressure that exists during a time period under consideration (2) *sound pressure*, which is the variation of atmospheric pressure about the steady atmospheric pressure; an important unit of sound pressure is the pascal (Pa), (3) *level*, which is a logarithm of a sound pressure ratio; the usual unit of level is the decibel (dB), and (4) *flat*, pertaining to a frequency range wide enough to include the significant frequency components of sound, over which the response of the measuring instrument does not change much with frequency; this range must be specified for each measuring instrument.

Although the above-contained definition of "peak" is simple, it leads to large numbers of measurements to describe the noise in the community. If only the peak sound pressure level in an hour were reported, information would be lost completely about the many different time patterns that could occur, which all have the

the events recorded between 91 and 99.6 dB. On this same location, using the Slow A sound pressure level (Slow A SPL) scale, with an ambient level of between 42 and 53 dB, the

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same peak value. Therefore, it is customary to measure a certain average over one of several standardized time intervals. The averaging time frequency used in a sound level meter is called FAST: it causes the sound level meter to respond primarily to recent sounds (mostly within 1/8 second) almost as quickly as does the ear in judging the loudness of a sound. This measurement is called *fast sound level.*

A standardized slower response is additionally available in the sound level meter; it is called SLOW. It likewise causes the sound level meter to respond primarily to recent sound (mostly within one second). This level is called *slow sound level.*

Noise in the community may vary widely within any given time span. To get a single number to represent all the noise in a longer time period, an average is taken (in a way peculiar to sound level meters) over a minute, hour, day or year. For *average sound level,* equal emphasis is given to all sound within the stated averaging period; whereas for peak, fast, or slow sound level, the emphasis is graduated to put much more emphasis on recently occurring sounds. A time-period average sound level is also called an equivalent continuous sound level.

Because people are annoyed more by sounds at night, a noise descriptor now widely recognized is the *day-night average sound level.* This is the 24-hour average sound level obtained for a given day after addition of ten decibels to sound levels that occur from midnight up to 7 A.M. and from 10 P.M. to midnight.

Sound exposure level is a recently developed measure of the total sound accumulated over a given time period or event. It is not an average. It is particularly appropriate for a discrete event like the explosion of a bomb, the passage of an aircraft or a clap of thunder. In contrast to average sound level which for a steady sound remains constant, the sound exposure level of a steady sound increases continuously with the passing of time.

The ear does not respond equally to sounds of any frequency; it is most sensitive to sounds of any frequency; it is most sensitive to sounds whose frequency are in the vicinity of 3,000 hertz (cycles per second) near the top of the playing range of a piano. To simulate this ear response, the sound level meter is given the *A-frequency weighting.* A standard sound level meter may contain still other frequency weightings, such as the *C-frequency weighting*

events recorded between 45.8 and 53 dB. At Santa Maria, using the peak flat SPL scale, with an ambient level of between 70 and 92 dB, the recorded events varied between 94.8 and 102.2 dB, but several of the events could not be picked up even with the instruments. On the Slow A SPL scale, with ambient levels of between 48 and 57 dB, none of the events could be heard. The events in question involved up to 8-500 pound bombs simultaneously dropped.

It is an established scientific fact that damage begins to occur to both people (eardrums) and houses (window breakage), at a peak flat SPL of 140 dB. Ground motion damage to structures can begin to occur at 3 millimeters vibrations per second. The above recordings, together with other matters to be discussed do not establish sound pressures or ground motion levels[64] in the civilian areas anywhere near these levels.

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which yields essentially the same constant response to sounds of any frequency between 32 and 8000 hertz.

Sound level is the quantity measured by a sound level meter. The unit of sound level and other levels is the decibel (dB). The quantity is actually a sound pressure level, but since sound pressure is the most commonly measured characteristic of a sound, it is feasible to omit the word "pressure" from the name of the quantity. The A-frequency weighting and the FAST time averaging approximately match the ear; they are understood when the simple term "sound level" is used.

The source for the above definitions and descriptions are pages 3-4 of Technical Note No. 544 of the Naval Ocean Systems Center, San Diego, California, which is entitled "Noise Measurements on Isla de Vieques, 4 April through 6 October 1978", by Dr. Robert W. Young. This is Defendants' Exhibit 62.

[63] This is the level of sound produced by the general area in which the sound measuring of a discrete noise source is to take place.

[64] Interestingly enough, although it is possible by the use of seismographs and other similar instruments to take readings of shock-induced ground movements, Plaintiffs offered no such evidence but relied on so-called eye witness accounts of these phenomena. We do not credit said testimony.

Weather conditions are of great importance to sound and ground motion problems because they can bring about focusing. Under severe focusing conditions the peak flat SPL can be increased by up to 25 dB, and ground motion can be multiplied by a factor of up to 18. Under these weather conditions the predicted levels for Isabel Segunda are marginal for four Mark 83 bombs, which are 1000 pound bombs, detonated simultaneously.[45] Studies indicate that these weather conditions occur less than 10% of the days during the year, and during these days, Defendant Navy takes corrective action.

To prevent excessive noise caused by sound focusing phenomena, Defendant Navy has set up an elaborate noise abatement system for the inner range. Meteorological information for San Juan and St. Martin is collected twice a day and fed into a computer which is programmed to provide a sound focusing prediction for a given explosion. This data can be used for predicting trends of sound focusing on Vieques, but not for predicting absolute magnitudes of sound pressure levels. Thus a supplementary verification system has been set

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A social survey taken by Plaintiffs on Vieques indicates that nearly 94% of the civilian residents feel that noise is not a problem in their neighborhood. In this same survey however, when the sample was asked about noise from the Naval activity, 25% to 30% of the people stated they were highly annoyed. Twice as many people indicated that they would like to have Defendant Navy leave Vieques as those who indicated that they were highly annoyed with noise. This would seem to indicate that there is an attitudinal problem which bears little relation to the polled individual's perception of noise and thus these "eye witness" accounts cannot be deemed reliable when compared to "hard" scientific evidence to the contrary.

[45] Depending on the prediction technique, the air blast could be between 139 and 142 dB, and ground motion, 3.1 mm/sec. Predictions of blast over pressure from artillery firing from the peninsula near Luján, a distance of about 5 kilometers, indicate that a peak flat SPL in the range of 108 dB would be produced by a muzzle blast equivalent to 10 pounds. Under extreme focusing conditions, the maximum peak flat SPL would be 133 dB.

up whereby test bombs are dropped and reports received from listeners located in St. Thomas, St. Croix, Camp García and at the police station in Isabel Segunda. A meter on Crown Mountain in St. Thomas also sends a digital readout to the observation post in Cerro Matías. If the information received establishes high noise levels, operations are modified or curtailed, or in extreme cases, cancelled.

A compilation of the measurement of one-hour average sound levels made by both Plaintiffs and Defendants at 18 sites on Vieques over a six month period;[66] reveals that at all populated areas on Vieques, except Luján in October, the average day-night average sound level was about 58 dB. An analysis of this information reveals that most of the sound comes from natural sources: the biota, rain and thunder. Activities of local residents appear to be next in order as sound makers.

Twelve graphs of one-hour average sound levels illustrate that on many locations (except Luján in October), there was a sudden increase in sound just at sunset that is clearly not caused by Defendant Navy's activities. Furthermore, the one-hour average sound level remains high into the early morning hours, long after the cessation of Defendant Navy's military activities. Such night time sounds are well-known to be associated with the mating calls of the Puerto Rican tree frog (*eleutherodoctylus portoricensis*), also known as the *coquí*. This conclusion is reaffirmed when compared to evidence that the sudden increase in noise at sundown was not recorded on less humid days, a fact scientifically supported in that the *coquí* ceases calling soon after sundown on nights when the relative humidity goes below 85%.[67]

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[66] Complete 24-hour data were available for 29 days in that six-month period. The day-night average sound level was calculated for each of these days. This is a 24-hour average sound level for which, as previously stated, there is a 10 dB emphasis on sound levels that occur before 7 A.M. and after 10 P.M.

[67] See also *El Coquí: Unico en el Mundo*, by Jorge Luis León, "El Mundo", p. 15A, July 29, 1979.

At Destino, the cumulated sound of big claps of thunder were measured by automatically activated equipment which operated there for ten days to measure the sound exposure levels. The sound exposure levels of two claps of thunder, which were specifically identified by a witness, were respectively 96.7 and 103.6 dB. These levels may be compared with the sound exposure level of 77.6 dB of a 500-pound (Mark 82) bomb at a distance of 3 miles. The difference of more than 20 decibels between the exposure levels of thunder and a bomb, means that the dropping of 100 bombs 3 miles from Destino would cause the same cumulated sound there (and the same average sound level) as would one big clap of thunder. (Thunder at Vieques is common in the summer).

Aircraft noise was measured at Destino while two Naval aircraft (Type A-6, which is a noisier aircraft than the A-7) made 25 northward runs over Target 2 (only inert bombs were dropped on this target); after a run they made a left turn and returned southward, east of Destino, to make another run. Fourteen of the runs triggered the automatic measuring equipment, yielding a typical sound exposure level at Destino, for one A-6 aircraft, of 79.3 dB. Inasmuch as the sound exposure levels of the other 11 runs were less than the smallest one that did activate the automatic measuring system, by the rules for levels, the typical sound exposure level of all 25 of the A-6 aircraft flying southward east of Destino was 76.7 dB.

In 1977-78 the average number of aircraft (all types) making runs on Target 2, and the climbing left turns thereafter, was 37.8 per day. An analysis of the distribution of operations for 20 days in August and September 1978 indicated that 3 per cent of aircraft operations occur after 10 p. m. In view of the 10-dB emphasis on sound levels at night, the yearly day-night average sound level at Destino, due to aircraft, would be 44 decibels.

As noted above, the day-night average sound level at Destino for the six months recorded due to all sources of noise, was about 58 dB. If the yearly aircraft operations described above were stopped entirely, the day-night average

sound level at Destino would drop to 57.8 dB — an insignificant reduction of 0.2 dB.

Naval gunfire at the Vieques target range in September 1978 did not appreciably increase the noise at Destino, and presumably at other populated areas more distant from the guns. The evidence establishes a one-hour average sound level for the hour ending at 1:00 P.M. on September, 1978. This is the highest level at any time during the 10 days of monitoring at the Topside House, at Destino. This high level was due to thunder and rain. During the five hours 1:00 to 6:00 P.M. on September 29, 1978, the one hour average sound levels were respectively 40.3, 46.0, 42.5, 41.3 and 41.0 dB. These are among the lowest in the 10-day period notwithstanding that the Weekly Range Utilization work sheet for September 29, 1978 lists for the same five hours 7, 6, 4, 10 and 0 rounds respectively fired by 5-inch guns. The fact that the one-hour average sound level was 41.0 dB at Destino when there was no gunfire at all, and 41.3 dB with the firing of 10 rounds, means that the gunfire added appreciably nothing to the noise at Destino, even in the quietest hours.

The lowest one-hour average sound level, day or night throughout the 10-day period, was 39.6 dB, for the hour ending at 2:00 P.M. on 30 September 1978. During this quietest hour, 13 rounds were fired by 5-inch guns. This gunfire likewise added nothing significant to the prevailing ambient noise.

According to a report of the National academy of Sciences entitled "Guidelines for Preparing Environmental Impact Statements on Noise", 1977, the primary measure for describing noise in an environmental impact statement is the day-night average sound level. Various documents of the Environmental Protection Agency have named the day-night average (A-weighted) sound level as the primary measure of noise in the community. A day-night average sound level of 55 decibels is identified as the outdoor level in residential areas compatible with the protection of public health and welfare. This day-night average sound level is based on all

sounds at the particular location. Along these same lines, should be further noted that the Acoustical Society of America's proposed American National Standard S.3.23, recommends a yearly day-night average sound level of between 50 to 65 dB for residential, single-family building where extensive outdoor use is anticipated.

The "hard" scientific evidence refutes Plaintiffs' allegation that military operations create shock waves and excessive noise that interfere with health and welfare of residents of Vieques. The yearly day-night average sound level at Destino due to Navy aircraft is less than 44 dB, and due to gunfire, less than 41 dB.

It would be impossible for planning purposes to adopt a day-night average sound level limit lower than 55 dB, because the outdoor living on Vieques is already adapted to a day-night average sound level at times as high as 58 dB, which as previously stated is due mostly to biota, rain, thunder and the activities of the residents thereof. If an attempt were made to allow residential building only at places where the yearly day-night average sound level is less than 50 dB, no one would be allowed to build on Vieques. Whatever limit is adopted, it must be applied to the *combination of all sounds,* without discrimination as to source.

For the above reasons it is our opinion that Plaintiffs' claims under the Act lack a basis in fact as well as law.

H. The Coastal Zone Management Act and related matters under the Endangered Species Act and the Marine Mammal Protection Act

Plaintiffs allege that Defendant Navy's activities are inconsistent with the Coastal Zone Management Act of 1972, 16 U.S.C. §1451 *et. seq.* (hereinafter called the "CZMA" in this section) or with the Puerto Rico Coastal Management Plan (hereinafter called the "Plan") promulgated pursuant to CZMA.

The "CZMA" is an all-encompassing statement of Federal policy[4] vis-a-vis the Nation's coastal zone, which provides for various programs and grants to the States related to this policy. 16 U.S.C. §§1454, 1455, 1456, 1456a, 1456b, 1456c, 1458, 1461. This statute is administered by the National Oceanic and Atmospheric Administration, an agency which is part of the United States Department of Commerce. Pursuant to 16 U.S.C. §§1454-1455 said agency, on September 21, 1978, approved the Plan submitted by the Commonwealth of Puerto Rico.

The "CZMA" provides that:

> "Each Federal agency conducting or supporting activities directly affecting the *coastal zone* shall conduct or support those activities in a manner which is *to the maximum extent practicable* consistent with approved state management programs." 16 U.S.C. §1456(c)(1). (Emphasis added).

As can readily be seen, the bone of this contention centers around Plaintiffs' allegations that Defendant Navy's activities are inconsistent with the Commonwealth's Plan, while Defendant Navy claims that they have complied "to the maximum extent practicable." Defendant Navy also alleges that Plaintiffs' actions suffer from certain procedural defects.

There are various reasons why Plaintiffs' contentions are inappropriate, not least of which is that the " CZMA" and the Commonwealth's Plan are inapplicable to the Defendant Navy's lands in Vieques.

The "CZMA", at 16 U.S.C. §1453(1) specifically excludes the lands in question:

> "The term 'Coastal zone' means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states,

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[4] See 16 U.S.C. §§1451, 1452.

and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. *Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.*" (Emphasis supplied).

The legislature history of this provision leaves little doubt as to this interpretation.

"This section defines the various terms used throughout this bill. Of particular importance is the definition of 'Coastal zone.' The coastal zone is meant to include the *non-Federal* coastal waters and the *non-Federal* land beneath the coastal waters, and the adjacent *non-Federal* shore lands including the waters therein and thereunder. . . . The zone also includes such transitional and intertidal (sic) as salt marshes, wetlands, and beaches. The outer limit of the zone is the outer limit of the territorial sea, beyond which the States have no clear authority to act. All federal agencies conducting or supporting activities in the coastal zone are required to administer their programs consistent with approved state management program. However, *such requirements do not convey,* release or diminish any rights reserved or possessed by the Federal Government under the Submerged Lands Act or the Outer Continent Shelf Lands Act or *extend state authority to* land subject solely to the discretion of the Federal Government such as national parks, forests and wildlife refuges, Indian reservations and *defense establishments* . . ." (Emphasis added).

See Senate Report No. 92-753, 1972 U.S. Code Cong. and Admin.News, p. 4783. In the "Joint Explanatory Statement of the Committee of Conference", the Congress stated:

> ". . . The Conferees also adopted the Senate language in this section which made it clear that Federal lands are not included within a state's coastal zone. . . ."

See Conference Report No. 92-1544, 1972 U.S.Code Cong. & Admin.News, p. 4822.

Interestingly enough, the evidence on record shows that at a time when litigation was not contemplated, Plaintiff Environmental Quality Board agreed with this conclusion. A cursory review of the approved Plan reveals that the Environmental Quality Board specifically *excluded* Federal lands in Vieques from the provisions of the Plan.[*]

We are confronted, however, with certain provisions of the regulations promoted by the National Oceanic and Atmospheric Administration pursuant to the "CZMA", which state:

> "Federal activities outside of the coastal zone (e.g., on excluded Federal lands . . . or landward of the coastal zone) are subject to Federal agency review to determine whether they significantly affect the coastal zone." 15 CFR 930.33(c).

We are somewhat at a loss to reconcile how Federal lands which are specifically excluded by the "CZMA" can nevertheless be subjected to review by administrative fiat. It would seem that the administrative inclusion of what has been legislatively excluded constitutes an *ultra vires* act. See, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, p. 304, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979). We need not decide this, however, as discussion of the merits of this controversy is also relevant to other pending issues.

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[*] See in *Exhibit CRB* 400A (footnote at page 185(a); see note on Map 9; page A-5; page B-20; Map 27; pages C-18, C-19).

Before entering into the merits of Plaintiffs' claims, however, we should consider the procedural objections raised by Defendant Navy to the effect that pursuant to the "CZMA's" mediation procedure (16 U.S.C. §1456(h)), the Court should defer to the "primary jurisdiction"[70] of the administrative agency charged with implementing the "CZMA". This point is not well taken. The mediation procedures contained in the "CZMA" are only mandatory on the Secretary of Interior[71] and not on either the Federal agency or the coastal states, a fact made abundantly clear by the regulations enacted pursuant to said statute.[72]

The substantive charges implicit in Plaintiffs' allegations hereunder are without merit. Although the nature of Defendant Navy's activities have a tendency towards provoking dramatic conclusions, a dispassionate analysis of the scientific evidence leads us to the conclusion that the negative impact of the Defendant Navy's activities on the coastal zone of Vieques

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[70] See gen.: Davis, *Administrative Law Treatise,* 19.01-19.06; *United States* v. *Western Pacific R.R. Co.,* 352 U.S. 59, 63-64, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956); *Far East Conference* v. *United States,* 342 U.S. 570, 574, 72 S.Ct. 492, 96 L.Ed. 576 (1952).

[71] 16 U.S.C. §1456(h) reads as follows:

"In case of serious disagreement between any Federal agency and a coastal state —

(1) in the development or the initial implementation of a management program under Section 1454 of this title; or

(2) in the administration of a management program approved under section 1455 of this title; the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned."

[72] 15 CFR 930.116 Judicial review:

"The availability of the mediation services in this subpart is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided for in this subpart."

is negligible, and if the truth be said, the control of large area of Vieques probably constitutes a positive factor in its over all ecology. The very fact that there are in the Navy zones modest numbers of various marine species which are practicallly non-existent in the civilian sector of Vieques or in the main island of Puerto Rico, is an eloquent example of *res ipsa loquitur.*[73]

An analysis of the various components which make for a healthy coastal ecosystem reinforces this view point:

(1) The coral reefs and related communities

Various studies were conducted related to alleged sedimentation of the reefs, particularly in the high impact areas of Bahía Salinas del Sur and Bahía Icacos. These studies were conducted with a view to determining the extent and location of any deposition of terrigenous sediment[74] offshore, the location of areas of sediment damage to coral reefs, and the source and causation of any excessive sedimentation on corals. This is important in that sedimentation not only causes turbidity in the water and therefore blocks off light essential to the various life processes, but also because sedimentation brings about stress to the coral, which diverts energy from its reef-building functions.

These studies show that the nature of sediments contained in the waters at the eastern end of Vieques[75] are similar to

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[73] Several marine turtles and manatees, of which we will later speak.

[74] Runoff.

[75] They reflect a high calcium carbonate sediment production rate typical to a small arid island. They are primarily biogenic aragonite with lesser amounts of calcite and a very small terrigenous fraction. Results of the percent insoluble analysis (used to determine percent terrigenous sediment) indicate a very low content of terrigenous sediment for all marine sediment samples, even in nearshore portions of shallow bays, except for those areas immediately adjacent to runoff sources: at the end of the "runaway" and adjacent to the inner gunnery target.

those of the Virgin Islands region, an area unaffected by Defendant Navy's activity and world-renowned for the clarity of its waters. Although there are some corals which have been damaged by sediment, mostly in a narrow zone on the protected or leeward edges of the reefs, the percentage of terrigenous sediment on these corals is very low, and runoff does not pose a threat of any measurable magnitude to any reef-building organism. The sediment damaged coral is the result of deposits caused by natural forces rather than Defendant Navy's activities.

Comparative studies of the *Montastrea annularis*, an abundant coral[76] and a reef builder in Vieques and throughout the Caribbean, show that the effect of Defendant Navy's activities in Vieques has been negligible in terms of retarding coral growth rate. At present there is no irreparable damage to coral reefs in Vieques and what damage does exist can be repaired by the reefs' normal growth processes.

Although undoubtedly there are some indications that stray ordnance have caused some pocketing in a limited area of the reefs of Bahia Salinas del Sur and Bahia Icacos, the bulk of the damage observed in the reefs there and elsewhere is caused by the natural processes of bioerosion and wave action, which processes causes cracks, shearing and breakage in *Montastrea*. This type of coral damage is typical of any high energy (i.e., wave) area, such as eastern Vieques, and can easily be confused with damage caused by explosions.

A comparison of Vieques reefs with those of the Virgin Islands is particularly apropos because of the almost identical geological, climatological, ecological and physical oceanographic parameters of these two areas.[77] Thus the analysis of Vieques reefs inside the area of naval activity vis-

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[76] Whose growth rate is highly sensitive to sedimentation and can easily be measured by X-Ray techniques.

[77] The biophysical similarity of these areas is mainly governed by two parameters: (1) they rise from a relatively shallow, sandy sea floor,and (2) they are subject to considerable wave energy.

a-vis the control reefs in the Virgin Islands outside of any naval activity should establish whether any differences exist that can be attributed to naval presence on Vieques.

In the study conducted in the eastern Vieques range area (AIA/CAS/NGFS) approximately 10,000 sample points were taken representing a linear distance of over 10 kilometers. In the Virgin Islands 4,440 sample points were taken representing a linear distance of over 4.4 kilometers. The results of these two transact analysis reveal that the reefs in the eastern part of Vieques and those in the Virgin Islands[78] are almost identical in composition. The organic portions of these reefs show nearly identical percentages for all major reefs components. The amount of broken, diseased, and dead coral, and of coral rubble is very similar in both areas. This tends to demonstrate that both reef systems are subject to the same kinds and same amount of stresses. It is particularly significant when we consider that a large percentage of the reefs studied in the Virgin Islands[79] is within the control of the Park Service of the Department of Interior and subject to stringent regulations as to its use, all of which reinforce our conclusion that the vast majority of coral rubble in both the Virgin Islands and Vieques is the result of natural bioerosion and wave action.[80]

The living biomass of both of these reef systems exhibit a very low abundance of plants and sponges.[81] This is again the result of the rather shallow and exposed surf crest type en-

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[78] Nine reefs were used in the Virgin Islands located in Dorothea Bay (St. Thomas), Little St. James, Johnson's Reef and Reef Bay (St. John's), and Tague Bay, Turner's Hole and Buck Island (St. Croix). Twelve reefs were used in Vieques commencing at Punta Este to Punta Icacos on the north coast and from Punta Este to Punta Matías on the south coast.

[79] Johnson's Reef and Reef Bay in St. John and Buck Island in St. Croix.

[80] As signified by the presence and dominance of the coral *Acrapora palmata,* which is a known indicator of high energy regimes.

[81] 1-2%.

vironment of these reefs. Sea grasses, microalgae and sponges do not usually flourish in a high energy environment.[82]

The quantitative assessment of 4,974 sample points of reef building corals in eastern Vieques reveals 14 points that show military impact. This is equivalent to 0.2% of the total reef and is representative of the damage attributable to the military to reefs in Vieques. This amount of damage is insignificant to the normal functioning of the Vieques reef ecosystem and clearly indicates that the impact of these activities on this system is negligible.

The coral reef fish communities in the Vieques range have also been compared with those in the Virgin Islands to determine differences in species, abundance, disease, parasitism and behavior.[83] The ten Vieques reefs studied showed 105 species, as compared to the seven Virgin Islands reefs, which showed 109 species. The average number of species counted per hour is also very similar with 45 for Vieques and 43 for the Virgin Islands respectively, as well as the abundance of species, with both areas having 19 species with abundance scores of over 50%.[84]

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[82] This is also reflected in the composition of the plant and sponge populations, i.e., a large percentage of the plant and sponge population found in the transits are represented by the Corallinaceae, a family of red, coralline algae; sponges include a high number of *Anthosignella variaus,* forma *incrustans.* Both the Corallinaceae and the *Anthrosignella variaus* species are adapted to high energy environments.

[83] The Vieques study area was the eastern part of Vieques, the selection of reefs being those closest to the target range, the theory being that these would show the greatest biological impact by Naval activities. Ten reefs were studied in Vieques and seven in the Virgin Islands.

[84] Because many of the species occur in large schools, it is impossible to individually count their number. It is thus, standard procedure to use an index of abundance score, in which the quantity of a species is placed into one of five numerical categories and an estimate of their numbers is made within a numerical range.

The sublethal effects of military ordnance were also studied. In over 50 hours of diving in Vieques, only one fish was observed with an open wound, and that was of undetermined origin. Disease was not seen in either Vieques or the Virgin Islands.[45]

No abnormal behavior was observed in either study area. In fact courtship and spawning of the Blue-Headed Wrasse was seen in all but two reef in both Vieques and the Virgin Islands, a factor which scientists consider demonstrative of a healthy and undisturbed fish population.

The results of this study are of relevance to commercial fishing in Vieques in that 40% of the species recorded are also caught commercially. Evidence that the numbers of the fish in the range have not been reduced by military activity is that the catch-per-unit-effort has remained constant from 1968 through 1978, in contrast with the south central area off Vieques, which is in the civilian sector, where the catch-per-unit-effort is half its level 10 years ago, thus indicating over-fishing by the fishermen rather than a negative impact from Naval activities.[46]

We thus conclude that the health of the coral reef fish in Vieques is equivalent to those of the Virgin Islands and reflect a substantially intact coral reef ecosystem.

(2) The sea-grass communities

The sea-grass communities located in Vieques at Bahía Icacos, Bahía Salinas, Bahía Salinas del Sur and Mosquito Bay were studied and compared to those of Tague Bay (St.

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[45] A large external isopod parasite was counted on the Yellowedged chromia, a very abundant fish in both study areas, showed almost identical average sightings per reef, 1.6 for Vieques and 1.5 for the Virgin Islands.

[46] This factor together with others that were brought out during the trial, such as the continued poaching by fishermen of turtles and their eggs, causes us to conclude that the Vieques fishermen are not as conservation-minded as they would have us believe.

Croix). Two grass species were studied: *Thalassia testudinum* and *Syringodium filiforne*. Average sea grass productivity at Vieques is 3.1 gm/m²/day as compared to 2.8gm/m²/day at St. Croix, thus showing slightly higher values in Vieques.[87] Furthermore, a comparison of the biomass weight of these two areas implies that the standing amounts of sea grass in both places is approximately equal.

The sea-grass studies thus show that Vieques has moderately productive sea-grass beds, that are healthy, and typical of sea-grass beds throughout the Caribbean.

A sampling of grassbeds fish yielded 25 species in Vieques and 35 species in St. Croix. The density of fish in St. Croix was 57.9 fish/sample compared to 21.5 fish/sample on Vieques. Species diversity on St. Croix was 3.107 as against 2.787 for all samples.

There is no doubt but that the impact of ordnance on grass beds creates craters and removes sediment and rhizones at the point of impact. This damage is limited to the immediate area of impact. No craters were observed larger than about six feet in diameter and these are principally limited to the waters in the immediate vicinity of Bahía Icacos, Bahía Salinas, and Bahía Salinas del Sur in the AIA/CAS/NGFS zone. None appear to be enlarging or becoming blowouts.

Blowouts, which are migrating holes in grassbeds that erode at one edge while recovering at another edge, occur on the northwest end of Vieques. Those blowouts were caused mainly during the construction of a fresh water pipe from Puerto Rico to Vieques, by Commonwealth employees or agents.

Grassbeds can recover from physical disturbance, and most of those on Vieques show signs of recovery. Nearly all craters show growth of green algae such as *Penicillus* and

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[87] The average value for Vieques sea grass approximately of 3.1 gm/m²/day compares favorably with world averages of daily productivity of cultivated wheat (2.5), corn (3.0) and rice (3.6).

Halimeda, which are known early colonizers in the Caribbean. At least two craters north of Punta Gato show colonization by *Thalassia*, the final state in recovery.

A comparison between aerial photographs of Bahía Icacos, Bahía Salinas and Bahía Salinas del Sur taken in 1936-37, which were taken in 1978, show an increase rather than decreases in the total sea-grass areas. In 1937 Bahía Salinas del Sur, an area of approximately 143.17 hectarea (Ha), contained about 35.7 Ha of seagrass of which 15.3 Ha were dense seagrass. In 1978 this area has 85 Ha of seagrass of which 63.5 Ha is dense seagrass. In Bahía Icacos and Salinas, a total area of about 33.8 Ha, there was an increase in seagrasses of from 7.5 to 17.4 Ha during this same period.

In our opinion the damage to seagrass from the activities of Defendant Navy is neither substantial, permanent nor irreversible. As a matter of fact, even if all the seagrass in the eastern end of Vieques were damaged or removed, this would constitute but a relatively small portion of the seagrass productivity of the entire island, as the largest seagrass beds are located not in the AIA/CAS/NGFS zones but rather in the western portions of Vieques.

Studies were also conducted of the benthic faunal communities associated with seagrasses around Vieques. The object of these studies was to quantify benthic (in fauna), epibenthic (live on sediment) and cryptic (live on and among the blades) fauna which provide the main link between primary production of the area and higher trophic level consumers, many of which are valuable sport and commercial species, and to assess the condition of these communities.[11]

The fauna of the samples was dominated numerically by small polychaetous annelids, with no sample dominated by any one species or even one family of organisms. No pattern was discernible that could be associated to Naval activity. For

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[11] Six sampling stations were within the impact zone in Bahía Salinas and Bahía Salinas del Sur, and five were in non-impact stations at Ensenada Honda, Puerto Negro and Mosquito Bay.

example, a station within a "very disturbed area" yielded a high abundance of organisms and had an almost exact analog in a station which had similar species and abundance but was more than 1 kilometer to the west, outside the impact area. The station with the highest seagrass biomass, off Punta Gato, had the fewest animals. We thus must conclude that benthic abundance can not be positively correlated to seagrass standing crop biomass.

Furthermore, any implication that military and other debris in a seagrass meadow is always detrimental is erroneous.[89] A change in the vertical relief in a seagrass bed or sand bottom acts as an attractant to important organisms such as spiny lobsters. Natural phenomena, such as blowouts, also provide this vertical relief and in Mosquito Bay serve as a surrogate reef, attracting concentrations of fishes and crustaceans usually found on patch reefs which are not present in the Bay.

(3) Mangrove wetlands

Mangroves are an important segment of the coastal ecosystem. See: *Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni*, supra. They are valuable as habitat for marine and estuarial vertebrates and invertebrates, are an important segment of the marine detrital food chain, and act as shoreline stabilizers.

As previously alluded to, there are several areas of mangrove in Vieques,[90] most of which are within Defendant Navy's properties. Commencing from west to east the important mangrove forests are the Punta Arenas-Laguna Kiani (199.49 "cuerdas")[91] and Laguna Playa Grande (57.68 cdas.)

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[89] Cf. 16 U.S.C. § 1220 et seq.

[90] All four varieties of mangrove common in the Caribbean are found in Vieques: red mangrove (*Rhizophora mangle*), white mangrove (*Laguncundora racemosa*), black mangrove (*Avicennia nitica*), and button mangrove (*Conocarpus erecta*).

[91] A " cuerda" is the equivalent of .97 acres.

forests in the NAF, and the Puerto Mosquito (102.12 cdas.), Puerto Ferro (48.18 cdas.), Bahía Tapón (20.36 cdas.), Bahía Chiva (34.27 cdas.), Bahía Yanuel (27.48 cdas.) and Ensenada Honda (86.18 cdas.) forests along the southern coast of the GMA. There are no mangrove stands of any significance or importance in either the SIA or AIA/CAS/NGFS zones.

Two of the above mangrove areas, Punta Arenas-Laguna Kiani and Puerto Mosquito, are under stress although the cause of the stress cannot be attributed to Defendant Navy's activities.

In the Punta Arenas-Laguna Kiani mangrove complex there is a large area of dead mangrove in the Laguna Boca Quebrada area. Plaintiffs claim that the cause of this mortality is the closing of an alleged access to the sea with a consequent rise in the salinity of the entrapped waters, a factor which is highly detrimental to mangrove forests. However, pre-1940 aerial photographs and maps of this area show the existence of a continuous roadway between that mangrove forest and the sea and thus clearly establish that the present day road existed before Defendant Navy's arrival in Vieques. Although there is a dry stream bed to the south of Punta Boca Quebrada which is crossed by tramway construction, this stream bed, as appears from a map of the area,[92] is not connected to the mangrove swamp but rather serves the watershed to the north of Monte Pirata. More recent maps show a channel-like connection between Laguna Boca Quebrada and the sea, but no evidence was presented as to any activity of Defendant Navy which could support a finding that Defendant Navy has caused its blockage. If such a channel did in fact exist, it would be as reasonable to presume that it has filled from natural causes. We might add that it would be a simple operation to reopen such a channel because of the proximity of Laguna Boca Quebrada to the sea.

The second mangrove area of immediate concern is that on the western side of Puerto Mosquito, behind the public

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[92] As well as from the helicopter inspection of the area.

beach at Ensenada Sombe. This mangrove, although bordering in part on the Naval reservation (GMA), is actually in the civilian sector. The cause of the stress to this forest is again the hypersalinity of the soil, this time brought about by the blockage or diversion of the fresh water runoff and ground water. This has been caused by the rerouting of the civilian road between Esperanza and Isabel Segunda and by the excessive pumping of wells in the area. Neither of these factors can be attributed to Defendant Navy.

In our opinion the activities of Defendant Navy have a negligible impact on the mangrove ecosystem of Vieques.

(4) Bioluminescent bays

There is no credible evidence on the record to support any finding that any activity of Defendant Navy has in any way affected the bioluminescent bays or the organisms that thrive therein.

(5) Beaches

There are numerous beaches throughout the Defendant Navy's property in Vieques. With the exception of those in the confines of the AIA/CAS/NGFS zones the public is allowed permission to use them when maneuvers are not in progress. Green Beach (Punta Arenas), as previously stated, is in fact used almost exclusively for recreational purposes by both service personnel and civilians.

As indicated, the bulk of the amphibious operations take place at Blue Beach on the South coast. These operations are not on a continuous basis but rather take place two or three time a year. There is no indication that the use of this beach for these purposes causes any significant negative impact on the beach or its related surroundings.

The beaches within the AIA/CAS/NGFS zone, namely those in Bahía Salinas del Sur, Bahía Icacos and Bahía Salinas frequently receive direct ordnance impact. This may result in debris being strewn throughout as well as occasional unexploded rounds or bombs. The latter are periodically cleared or

detonated in place by demolition crews of Defendant Navy. Quite obviously under its present use, these particular beaches would be inappropriate for use by the public. But in our opinion, the evidence is at best inconclusive that these activities have a *substantial* negative ecological impact on these beaches. In any event we conclude as a matter of law that because of the limited area in question and because of the intrinsic nature of the activity being conducted, Defendant Navy has "to the maximum extent practicable" conducted activities in compliance with the Act.

(6) Wildlife

Generally speaking, and leaving aside fish species already described, the wildlife in Vieques' coastal zone consists of various aquatic, mangrove, and sea birds species, various kinds of turtles, and lizards, and the manatee.

Birds, however, are the dominant form of wildlife in Vieques, and the coastal zone is no exception.[93] The existence,

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[93] The following is a summary of the bird species that can be found in the various areas of the Vieques coastal zone, keeping in mind that the abundance of number and of species to be found at any given time is subject to seasonal migrating variation:

(1) Mangrove forests: Yellow warbler (*Dendroica petechia*), Banaquit (*Coereba flaveola*), Greater Antillean Grackle (*Ouiscalus niger*), Black-whiskered Vireo (*Vireo altiloquis*), Grey Kingbird (*Tyrannus dominicensis*) Green-Throated Carib (*Sericotes holosericeus*), Zenaida Dove (*Zenaida aurita*), White-crowned Pigeon (*Columba leucocephala*) Mangrove Cuckoo (*Coccyzus minor*), Black-crowned Night Heron (*Nyctanassa violacea*), Great Blue Heron (*Ardea herodias*), Green Heron (*Butorides virescens*), Little Blue Heron (*Florida caerulea*), Cattle Egret (*Bubulcus ibis*), Great Egret (*Egretta alba*), Snowy Egret (*Egretta thula*).

(2) Mangrove Lagoons: Common Gallinule (*Gallinula Chloroopus*), Green Heron (supra), Clapper Rail (*Rallus Longirostris*), Little Blue Heron (supra), White checked Pintail (*Anas bahamensis*), Yellow-crowned Night Heron (supra), Tricolored Heron (*Hydranassa tricolor*) Snowy Egret (supra), Pied-billed Grebe (*Podilymbus podiceps*) Brown Pelican (*Pelecanus occidentalis*), Magnificent Frigatebird (*Fregata magnificens*) Great

relative abundance, and variety of bird life in Vieques, and in particular within Defendant Navy's properties, clearly negate Plaintiffs' contentions to the effect that the activities conducted therein are unfavorably affecting said wildlife. We do not credit evidence presented to the contrary.

Blue Heron (*supra*), Great egret (*supra*), Black crowned Night Heron (supra), Least Bittern (*ixobrychus exilis*), Blue-wing teal (*Anas discors*), Ruddy Duck (*Oxyura jamaicensis*), Osprey (*Pandionhaliaetus*) Caribbean Coot (*Fulica caribaca*), Laughing Gull (*Larus atricilla*) and Least Tern (*Sterna alifrons*).

(3) Mangrove mudflats and saltflats: Black-necked Stilt (*Himantopus mexicanus*), Thick-billed Plover (*Charadrius wilsonia*), Semipalmated Sandpiper (*Charadrius semipalmatus*), Ruddy Turnstone (*Arenaria interpres*), Short-billed Dowitcher (*Limnodromus griseus*), Black-bellied Plover (*Pluviales squatacola*), Greater Yellow Legs (*Tringa melancolucca*), Semipalmated Plover (*Charadrius semipalmatus*), Spotted Sandpiper (*Actitis mocularia*), Lesser Yellow Legs (*Tringa flavipes*), and the Least Tern (*supra*).

(4) Beaches: Thick-billed Plover (*supra*), Royal Tern (*Sterna maximus*), and Yellow-crowned Night Heron (*supra*).

(5) Offshore cays and rocky coastline with adjacent cliffs: Carribbean Martin (*Progne dominicensis*), Yellow Warbler (*Dendroica petechia*), Ground Dove (*Columbina passerina*), Green-throated Carib (supra), Grey Kingbird (*supra*), Caribbean Elaenia (*Elaenia martinica*), Zenaida Dove (*supra*), White-tailed Tropic-bird (*Phaethon lepturus*), Brown Pelican (*supra*), Brown Booby (*Sula leucogaster*), Magnificent Frigatebird (*supra*), Yellow-crowned Night Heron (supra), American Oystercatcher (*Haematopus ostralegus*), Laughing Gull (*supra*), Roseate Tern (*Sterna dougallii*), Bridled Tern (*Sterna anaethetus*) and Pearly-eyed Thrasher (*Margarops fuscatus*).

(6) Oceans

(a) Onshore waters and bays: Brown Pelican (*supra*), Magnificent Frigatebird (*supra*), Royal Tern (*supra*), Laughing Gull (*supra*), Brown Booby (*supra*), Osprey (*supra*), and Least Tern (*supra*).

a. The Endangered Species Act

As previously stated, various species of Vieques' wildlife are listed as threatened or endangered pursuant to the Endangered Species Act, 16 U.S.C. §1531 *et seq.*[14] and these should be discussed herein with some particularity. The endangered species include the Brown Pelican, the Hawksbill Turtle, the Leatherback Turtle and the West Indian Manatee. See 50 CFR §17.11. The threatened species include the Green Turtle and the Loggerhead Turtle. See 43 Fed.Reg. 32800.

It is a declared purpose of this statute "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] that all Federal departments and agencies . . . seek to conserve endangered species and threatened species." 16 U.S.C. §1531 (b) and (c). Generally speaking the "taking" by any person of any endangered species within the United States or its territorial sea is prohibited. 16 U.S.C. §1538. This statute defines "taking" as including to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §1532(19). The law encompasses within the term "person" any "officer, employee, agent, department, or instrumentality of the Federal Government." 16 U.S.C. §1532(13). All Federal

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[14] 16 U.S.C. § 1532:

"(6) The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range . . .

* * *

"(20) The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

The Statute provides for a procedure whereby the Secretary of the Interior, by regulation, establishes what species are threatened and/or endangered. 16 U.S.C. § 1533.

There is no flora from any part of Puerto Rico, including the Island of Vieques, which is currently listed as endangered or threatened.

departments and agencies are required to carry out programs for the conservation of threatened and endangered species, and to insure that actions "authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered . . . and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical." 16 U.S.C. §1536(a).

It is an undisputed fact that all of the mentioned threatened or endangered species can be found in Vieques or its surrounding seas.

The substance of Plaintiffs' allegations is that Defendant Navy's activities constitute prohibited "takings." It is further alleged that these actions are contrary to law in that they fail to ensure that the species' continued existence is not jeopardized or that habitat deemed critical is not destroyed or adversely modified.

It is best to discuss these species separately.

i. The Brown Pelican

Brown Pelicans are colonial nesters, who seem to prefer to construct their nests on perches in small coastal islands. In Vieques, they have established a nesting colony on Cayo Conejo (also referred to at times as No-Name Island), a two acre island located just off-shore from Bahía Salinas del Sur on the AIA/CAS/NGFS zones.

Plaintiffs claim that the Cayo Conejo rookery is one of only two in Puerto Rico, the other one being in a small island off La Parguera, in the South coast. They claim that Defendant Navy's activities disturb the Brown Pelican's reproductive activities because they prefer quiet, secluded surroundings to carry out these functions.

Although these are plausible arguments, we are immediately confronted with various factors which militate against our adoption of the same. The most obvious one is the very fact that the pelicans have chosen Cayo Conejo as a

nesting site. This rookery has been known to exist since at least 1971. If pelicans are as susceptible to military activity as is alleged one wonders why they established a nesting colony in such close proximity to Vieques' most active military zone. In fact, the "Puerto Rico Coastal Management Program and Final Environmental Impact Statement" (referred to in Section IV H above, as the "Plan", prepared by the Department of Natural Resources of the Commonwealth), lists the mudflats in San Juan Bay, a commercial harbor with considerable traffic and in whose midst is located an important local airport, "as [a] nesting area[s] by the Brown Pelican" (supra, p. C-1).[9] More in point however, there is no evidence of a decline in the total population of the Vieques pelicans, a factor which would seem to bear a direct relationship to the breeding rate of the resident birds, and thus on whether the Cayo Conejo colony is being disturbed by Defendant Navy's activities.

There is more specific data to substantiate these conclusions. Studies conducted of the Cayo Conejo group showed a clutch size of 2.58 eggs per nest, precisely the same clutch size found in Florida colonies during an eight year study. This tends to demonstrate that the Vieques colony has not suffered during the nesting season. The birds observed in Vieques had an age-class distribution with a high percentage of "birds of the year", and a reasonable number of subadults, which also indicates a healthy population with a stable age-class distribution. Direct observation of the Cayo Conejo group during both periods of military activity and otherwise, showed no noticeable reaction by pelicans during military operations. In fact pelicans were observed engaging in low-intensity court-

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[9] The large number of Brown Pelicans that can be seen throughout Puerto Rico would seem to put in question their "endangered" status, in fact if not in law (this can not, of course, be legally questioned except through the administrative procedures encompassed in 16 U.S.C. §1533). In San Juan Harbor for example, many could be see, even within sight of undersigned Judge while sitting on the bench presiding in this case.

ship behaviour during operations, even though adult birds are most susceptible to any form of disturbance during courtship activity. This is supportive of scientific opinion that birds, including Brown Pelicans, habituate themselves to noise and to the presence of airplanes.

From personal observation by the Court, there is no evidence of recent military activity taking place on Cayo Conejo. The only evidence that could be observed of any military activity on this island were the remains of some craters, completely covered over by grass, and some rusted metal fragments. In fact, the major disturbance to this nesting colony is brought about by visits of fishermen who go onto the cay to collect snails. By restricting the presence of humans in this area, Defendant Navy has *de facto* provided a refuge for the pelicans (and other wildlife).

Although there is no designated critical habitat in Vieques for Brown Pelicans, Defendant Navy has proposed a cooperative agreement with the U.S. Fish and Wildlife Service establishing Cayo Conejo as a managed resource for Brown Pelicans. Under this agreement overflights are restricted to altitudes above 500 feet and no personnel will be permitted to visit the cay except on ornithological or operational safety matters. This altitude restriction is presently contained in Defendant Navy's Range User's Manual.

ii. The Sea Turtles

Here again we are confronted with the fact that the sightings of the turtles and of their nests are almost exclusively within Defendant Navy's properties or in the waters adjacent thereto, and again in close proximity to or within the AIA/CAS/NGFS zone. Plaintiffs contend that this dictates the automatic curtailment of Defendant Navy's activities, without considering that it is perhaps this presence that accounts for the existence of the species there.

In any event, we must take into account that Vieques is not considered a major turtle site in terms of the range of the species here in question. This is a fact which has been official-

ly recognized by the failure to designate as critical habitat any area in Vieques for any of these species.

The evidence shows that the population of green turtles on Vieques does not represent a significant proportion of the total number of these species. Again in terms of the total numbers of the species, the number of loggerhead turtles in the Caribbean is quite small, and those that can be found in Vieques insignificant. Even the presence of the leatherback and hawkbill turtles in Vieques is not of importance in terms of relative numbers when compared to the various other Caribbean sites where it is found, notwithstanding that these two species are the most abundant of the sea turtles to be found in Vieques.

Furthermore, no credible evidence was presented to show that any activity of Defendant Navy is affecting the sea turtles in Vieques in any significant manner.[96] The record shows that the greatest threat to these species in Vieques, as throughout the Caribbean, has been the unrestricted fishing that has taken place.[97] There is evidence that this fishing, although

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[96] Although it is undoubtedly true that if a heavy tracked vehicle were to pass over a turtle nest the nest would be destroyed, it is clear speculation to say that this is taking place. The areas used by the turtles for nesting sites are located in the northeastern extremities of Vieques in beaches which are mostly isolated and not used for landings.

Copious testimony was also presented dealing with a theory to the effect that the light from parachute flares attracts the hatchlings inland, thus causing their destruction. We consider this such an absurd argument when one considers the many other sources of light in Vieques, including the moon, that it bears no further comment.

[97] The records of catches of a Vieques fisherman were presented at the trial. These showed a steady decline in the catches, as the adult reproducing stock was progressively decimated. The removal of adult sea turtles from the population is much more serious than the removal or destruction of sea turtle eggs. The numbers of hatchlings that attain adulthood is very low, due to natural causes such as predation by sea gulls. It is thus imperative that there be large number of eggs laid to overcome this high natural mortality rate. The killing of an adult has the obvious result of reducing to zero the reproduction rate of that adult.

presently illegal under the Endangered Species Act, is still taking place around Vieques, together with the poaching of sea turtle eggs and nesting adults. Defendant Navy's presence on Vieques, together with the restrictive nature of its activities, has had some measure of benefit to the turtle population by precluding some of the illegal fishing and egg poaching.

b. The Manatee and the Marine Mammal Protection Act

The Manatee (*Trichechus manatus*), a large herbivorous marine mammal of the order *Sirenia*, is protected by the provisions of both the Endangered Species Act, supra, and the Marine Mammal Protection Act, 16 U.S.C. §1361 *et seq.*, see specifically 16 U.S.C. §1362(5)." This later statute also prohibits the "taking" of the manatee by any person in waters or on lands under the jurisdiction of the United States (16 U.S.C. §1372(2)(A)). The definitions of "taking" and "person" in this law are similar to those contained in the endangered Species Act. 16 U.S.C. §1362(10),(13).

The evidence presented demonstrates that the manatee is found in larger numbers and concentration in Vieques than in any other area of Puerto Rico except perhaps the Naval Reservation at Roosevelt Roads, across Vieques Sound. We do not deem it coincidental that both of these areas are under the control of Defendant Navy.

The Vieques group, which is concentrated almost exclusively in the sea grass beds around Punta Arenas (in the northwest), consists of between 13 to 25 manatees and includes a significantly large proportion of calves. It remains questionable whether the manatee population of Vieques is totally discreet form that of Roosevelt Roads, particularly since there are no year round fresh water sources on Vieques,

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" "The term 'marine mammal' means any mammal which

(A) is morphologically adapted to the marine environment (including . . . members of the orders Sirenia . . .)."

which seems to be a periodic requirement for mantees.[99] However, the northwestern sector of Vieques, in addition to containing large areas of sea grass, has sediment of sufficient penetrability as to allow the manatee to easily root for the base of the grass, the preferred manner of feeding of manatee.

As previously indicated, the area of Vieques preferred by the manatee is an area almost totally devoid of any military activity. Again, although no area of Puerto Rico has been designated as critical habitat, we can find no activity of Defendant Navy which can be said to be affecting in any adverse way the manatee or its habitat.

The facts which we have found proven establish as a matter of law that there has been no "taking" of any of the above-mentioned endangered or threatened species under either the Endangered Species Act or, as applicable, the Marine Mammal Protection Act.[100] Furthermore, as previously indicated, no "critical habitat" designation has been effectuated as to any of these species pursuant to the procedures established by the Endangered Species Act, 16 U.S.C. §1533. Lastly, the actions filed under both the Endanged Species Act and the Marine Mammal Protection Act suffer from serious procedural defects: as to the first statute, Plaintiffs have failed to comply with the 60-day notice requirement of 16 U.S.C.

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[99] There are various fresh water streams in and around the Roosevelt Roads area.

[100] 50 C.F.R. §17.3 defines "harass" and "harm" to mean, respectively:

> An intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral pattern which include but are not limited to, breeding, feeding or sheltering."
>
> "An act or omission which actually injures or kills wildlife, including acts which significantly disrupt essential behavioral pattern, which include, but are not limited to, breeding, feeding, or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of harm."

1540(g)(2),[101] which we deem to bar this citizen suit, (Cf. *Loveladies Property Owners Assn.* v. *Raab,* supra, at page 281); and as to the second, said Act not only fails to establish "citizen suits" for its enforcement but rather specifically limits such powers to the Secretary,[102] and thus Plaintiffs lack standing herein to enforce this Act.[103]

The sum total of the matter discussed under Section IV H above of this decision is thus that Plaintiffs have failed to state claims under either the Coastal Zone Management Act, the Endangered Species Act or the Marine Mammal Protection Act.

I. The National Historic Preservation Act and Executive Order 11593.

Plaintiffs allege violations by Defendant Navy of Executive Order 11593 ("Protection and Enhancement of the Cultural Environment", May 13, 1971, 36 F.R. 8921, noted at 16 U.S.C. §470) and of Section 106 of the National Historic Preservation Act (16 U.S.C. §470f), referred to as the "Act" in this Section.

Section 2 of the Executive Order states in part, that federal agencies shall:

> "(a) no later than July 1, 1973, with the advice of the Secretary of the Interior and in cooperation with the liaision officer for historic preservation for the State or Territory involved, *locate, inventory, and nominate* to the Secretary of the Interior all sites, buildings, districts, and

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[101] Which reads in its pertinent part:

> "(A) No action may be commenced under subparagraph (1)(A) of this Section [citizen suits] (i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation . . ."

[102] 16 U.S.C. §1337. The Secretary can delegate enforcement to any State. 16 U.S.C. §1379(c). No such delegation has taken place here.

[103] See discussion Section IV E above.

objects under their jurisdiction or control *that appear to qualify for listing on the National Register of Historic Places.*

(b) *exercise caution during the interim period* until inventories and evaluations required by subsection (a) are completed to assure that any federally owned property that might qualify for nomination is not inadvertently transferred, sold, demolished or substantially altered. The agency head shall *refer any questionable actions* to the Secretary of the Interior for an opinion respecting the property's eligibility for inclusion on the National Register of Historic Places. The Secretary shall consult with the liaison officer for historic preservation for the State or territory involved in arriving at his opinion. Where, after a reasonable period in which to review and evaluate the property, the Secretary determines that the property is likely to meet the criteria prescribed for listing on the National Register of Historic Places, the Federal agency head shall reconsider the proposal in light of national enviromental and preservation policy. Where, after such reconsideration, the Federal agency head proposes to transfer, sell, demolish or substantially alter the property he shall not act with respect to property until the Advisory Council on Historic Preservation shall have been provided an opportunity to comment on the proposal." (Emphasis supplied).

Section 106 of the National Historic Preservation Act (16 U.S.C. §470f) states that:

"The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object *that*

is included in or eligible for inclusion[104] *in the National Register.* The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Sections 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking." (Emphasis added).

The National Register referred to is a listing maintained by the Secretary of the Interior ". . . of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture . . ." 16 U.S.C. §470a(a)(1). The Commonwealth of Puerto Rico is eligible to have listings in the National Register (16 U.S.C. §470a(b)(1)). There are three locations in Vieques that are enumerated therein: the fort and light house at Isabel Segunda, and Frenchman's House at Esperanza. See 44 Fed.Reg. 7416, 7561 (Feb. 6, 1979).

Criteria for inclusion in the National Register is established in 36 C.F.R. 800.10(a):

> " 'National Register Criteria' means the following criteria established by the Secretary of the Interior for use in evaluating and determining the eligibility of properties for listing in the National Register: The quality of significance in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects of State and local importance that possess integrity of location, design, setting, materials, workmanship, feeling and association and:
>
> (1) That are associated with events that have made a significant contribution to the broad patterns of our history; or
>
> (2) That are associated with the lives of persons significant in our past; or
>
> (3) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the

[104] The phrase "or eligible for inclusion in" was added to the Act by Pub.L. 94-422 in 1976.

work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual, distinction; or

(4) That have yielded, or may be likely to yield, information important in prehistory or history."

There is little doubt in our mind but that Defendant Navy did not at any time prior to the commencement of the present actions locate, inventory and/or nominate any site or otherwise that appear to qualify for listing on the National Register, as required by Section 2(a) of the Executive Order.

After these actions were filed, however, Defendant Navy has conducted an extensive survey to such effects.[105]

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[105] The methodology of this survey began with a literature search to provide an overview of the cultural resources on Vieques for historic and archeological sites. Material found at the Institute of Puerto Rican Culture and at the University of Puerto Rico was reviewed, and various persons were contacted in Vieques to supplement the documentary search. Thereafter a predictive base was prepared from which locations could be identified for purposes of evaluation.

The field work was performed in two phases. The first phase was the survey of the target area east of Cerro Matías, which took thirteen and a half days. The second phase involved a sampling program for the remainder of the island and required one hundred and eighteen man days of effort. The survey methods allowed a survey of 55% of the NAF and 34% of the eastern area.

Because of the size of the area on Vieques, it would take at least two years and hundreds of thousands of dollars to conduct a 100% survey. No other area of a comparable size to Vieques has been surveyed 100%, nor do we believe this to be the intention or a requirement of the law.

In our opinion the sampling method devised by Defendant Navy provides an unbiased sample of the archeological sites on the entire island of Vieques. This method divided Vieques into 665 sectors each of which measured 500 by 500 meters. A group of sectors (10%) were picked at random from a random numbers chart. Another 10% of the total of 665 sectors was chosen by picking the first number at random and then selecting all the other sectors at constant intervals. The third group was picked based on the knowledge of experts as to where archeological and historic sites should be found.

Prior to this survey twenty-nine archeological sites were known to exist in Vieques, of which all but two were in the civilian sector. The survey found an additional forty-five new sites, forty of which are on military property. The survey also located seventeen historical sites and structures, thirteen of which are on Naval lands.

There are at present no significant archeological or historical sites in the AIA/CAS/NGFS zones. Any that may have existed there have in all probability been destroyed.[106]

The sites which are located West of Cerro Matías, however, are not in any immediate danger of harm or destruction by virtue of Defendant Navy's activities.

Although Defendant Navy admits that some of the newly discovered sites may be eligible for listing in the National Register no action has been taken to nominate them to the Secretary of the Interior or to seek his opinion respecting said eligibility. Thus Defendant Navy is in violation of Section 2(a)

On the field, the squares which were to be surveyed were walked at intervals of 100 meters from East to West, making several passes, and then from North to South at the same intervals. Four hundred twenty one squares, or 63.2% of the total squares on the island were reviewed in one manner or another. Defendant Navy's archeological survey teams actually walked 1.62% of the total surface of the island.

[106] In all fairness we should state that this could very well have happened prior to 1971. See also footnote 97. It is in any event an academic point. The fact is that this area is at present archeologically and historically sterile. We might add however, that we have some doubts as to whether this area was ever a likely place for such findings. The evidence tends to indicate that in historic times there was little activity there, and in prehistory, it was most probably a transit zone rather than one of settlement.

Some support for this theory is found in comparing St. Croix and Vieques, both of which are archeologically akin because of the similar nature of their soil types, their cultural sequences, and their geographic proximity. In St. Croix, as in Vieques, no archeological sites have been found on its eastern most end, an area which is comparable to that East of Cerro Matías.

and (b) of Executive Order 11593. This order was issued pursuant to statutory authority[107] and has the force of law. Cf. *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629, 632 (C.A. 5, 1967), cert. den. 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967); *Association for Women in Science* v. *Califano*, 566 F.2d 339, 344 (C.A.D.C.1977). Violation of this Order may be privately enforced. *Aluli* v. *Brown*, 437 F.Supp. 602, 608-609 (D.C.Haw., 1977) rev. in part, 602 F.2d 876 (C.A.9, 1979); *Save the Courthouse Committee* v. *Lynn*, 408 F.Supp. 1323, 1331 (S.D.N.Y., 1975).

J. Claims under the First and Fifth Amendments and Related Matters

A. Alleged violations of agreements, Presidential Orders and Congressional Directives.

Plaintiffs claim that Defendant Navy has violated an agreement, and commitments with the Commonwealth of Puerto Rico, not to transfer to Vieques operations formerly conducted by Defendant Navy in the Island of Culebra. It is also alleged that Defendant Navy in transferring these activities, violated Presidential and Secretary of Defense orders not to effectuate a transfer from Culebra to an alternate site in Puerto Rico, without prior Commonwealth approval. Lastly, Plaintiffs contend that Congress, in enacting various Military Construction Authorization Acts[108] intended "to exercise direct legislative supervision of the decision-making of the Department of Defense" with respect to the alleged Culebra transfer, by requiring the Secretary of Defense to study the problem, negotiate and obtain an agreement from the Commonwealth Government prior to any transfer within Puerto Rico, and report and recommend to Congress on the outcome of said matters.

[107] The National Environmental Policy Act of 1969 (42 U.S.C. §4321 *et seq.*); the National Historic Reservation Act of 1966 (16 U.S.C. §470 *et seq.*), the Historic Sites Act of 1935 (16 U.S.C. §461 *et seq.*), and the Antiquities Act of 1906 (16 U.S.C. §431 *et seq.*).

[108] The Military Construction Authorization Acts of 1971 (P.L. 91-511), 1972 (P.L. 92-145) and 1974 (P.L. 93-166).

The roots to these allegations are traceable to a controversy that commenced in this Court in the case of *Feliciano* v. *United States*, 297 F.Supp. 1356 (D.P.R., 1969), aff'd 422 F.2d 943 (C.A.1, 1970), cert. den. 400 U.S. 823, 91 S.Ct. 44, 27 L.Ed.2d 51 (1970). At its inception it involved a challenge to the executive order which created the Culebra Island Naval Defensive Sea Area. The Navy won that legal battle but lost the political war that ensued, which culminated in the cessation in 1975 of all weapons training activities in Culebra Island.

The many complex, intertwining happenings that took place between the *Feliciano* case and the Culebra cease fire are the alleged basis of the present contentions.

In October 1970 Congress enacted the Military Construction Authorization Act of 1971 (P.L. 91-511, 84 Stat. 1204). Section 611 of this law[109] required the Secretary of Defense to

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[109] "Sec. 611. (a) The Secretary of Defense is directed to undertake a study and to prepare a report on the weapons training now being conducted in the Culebra complex of the Atlantic Fleet Weapons Range. This study shall consider all possible alternatives, geographical and technological, to the training now taking place in the Culebra complex, and shall contain specific recommendations for, together with the estimated costs of, moving all or a part of such activities to a new site or sites, and appropriately modifying such activities to minimize danger to human health and safety. In addition, such study shall consider the feasibility of resettling the people of Culebra to another location in the Commonwealth of Puerto Rico, the cost of such a move, and the attitude of the people of Culebra to a generous resettlement plan that would have to be approved by a majority of the qualified electors of Culebra in a plebiscite. In preparing such study, the Secretary is directed to consider the impact of each of the alternatives on:

(1) the safety and well-being of the people who live on Culebra;

(2) the natural and physical environment of Culebra and adjoining cays and their recreational value;

study and report to Congress on the weapons training that was being conducted in Culebra with a view to considering "all possible alternatives, geographical and technological, to the training . . . taking place in the Culebra complex." The report should "contain specific recommendations for . . . moving all or a part of such activities to a new site or sites . . . " In preparing this report the Secretary was required to consult with the people of Culebra, the Government of Puerto Rico, and with appropriate Federal agencies. Furthermore, the Navy was directed to avoid any increase or expansion of its activities in the Culebra complex.

On January 11, 1971, a document entitled "Agreement" was signed by the Secretary of the Navy, John H. Chafee, the Governor of Puerto Rico, Luis A. Ferré, the President of the Puerto Rican Senate, Rafael Hernández Colón, and the Mayor of Culebra, Ramón Feliciano. This document prin-

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(3) the development of a sound, stable economy in Culebra;

(4) the unique political relationship of Culebra and Puerto Rico to the United States;

(5) the operational readiness and proficiency of the Atlantic Fleet; and

(6) National security.

(b) In preparing the report required by the section, the Secretary shall consult with the people of Culebra, the Government of Puerto Rico, and all appropriate Federal agencies having jurisdiction or special expertise on the subject matter involved. The report required by this subsection shall be transmitted to the President of the United States and to the chairmen of the Committees on Armed Services of the Senate and the House of Representatives no later than April 1, 1971.

(c) Pending the completion of the report required by this seciton and its review by the President of the United States, the appropriate committee and the Congress, the Department of Navy is directed to avoid any increase or expansion of the present weapons range activities in the Culebra complex and, wherever possible, without degrading the activities, to institute procedures which will minimize interference with the normal activities and the solitude of the people of Culebra." 84 Stat. 1225.

cipally dealt with various self-imposed operational restrictions by the Navy and contained a promise by this agency "to continue to investigate both technological and geographical alternatives to the training done around Culebra."

On April 1, 1971, in compliance with the requirements of Section 611(b) of Public Law 91-511 the Secretary of Defense, Melvin R. Laird, forwarded to the Congress and the President a report on the weapons training then being conducted in the Culebra complex. As a result of this report the Secretary ordered, among other things, the cessation of explosive bombardment in the northwest peninsula of Culebra as of January 1, 1972.

Later that year Congress enacted the Military Construction Authorization Act of 1972 (P.L. 92-145; 85 Stat. 394), in which the Secretary of Defense was directed to prepare "a detailed feasibility study of the most advantageous alternative to the weapons training now being conducted in the Culebra Complex of the Atlantic Fleet Weapons Range." §207, 85 Stat. 401. The standards to be used by the Secretary in determining the most advantageous alternatives were "cost, national security, the operational readiness and proficiency of the Atlantic Fleet, the impact on the environment, and other relevant factors." Id. This report was to be completed by December 31, 1972, and submitted, together with the Secretary's recommendations, to the President and to the chairmen of the Committees on Armed Services of the Senate and the House of Representatives.

This study was in fact submitted by Secretary Laird on December 27, 1972. It showed that the requirements for the Inner Range of the Atlantic Fleet Weapons Range, *which then included both Culebra and Vieques*, would not change substantially through 1985. The study predicted, however, a shift in the kind of operations conducted: naval gunfire support training, which was conducted mostly in the northwest peninsula of Culebra, was projected to decrease, while air-to-grounds weapons training, which was principally carried out on Vieques and several rocks and cays west of Culebra, were

forecast to increase. Of the five alternate sites studied none was deemed superior to Culebra, although based on the criteria given, Vieques was considered the most advantageous of the alternate sites. However, transferring to Vieques would involve the relocation of the "Culebra training targets to the east end of Vieques with one air-to-ground target two miles off the northwest tip of Vieques." The Secretary did not recommend this alternative as it was deemed to "significantly reduce the capability of the Inner Range and [to] transfer the training activity from an island with 700 inhabitants to one with 7,000 inhabitants", a situation which the Secretary discarded as not being a prudent course of action. The Secretary, however, indicated that the requirements of weapons systems and training changed with time, and thus the Navy would remain abreast of developments that would modify the study's conclusions, i.e., the Navy was keeping its options open.

Thereafter, in May, 1973, the new Secretary of Defense, Elliot Richardson, indicated to the Secretary of the Navy that in his opinion it was in the long-range interest of the Department of Defense to move the Navy training activities by July 1, 1975 from the Culebra complex *to the islands of Desecheo and Monito*, uninhabited islands lying in the Mona Passage, off the West coast of Puerto Rico, and a part thereof. The Secretary stated that *this* move was contingent upon Congress appropriating the funds and on working out "a satisfactory overall arrangement . . . with the Government of Puerto Rico for carrying out the proposed move and for insuring the long-term continuation of the Atlantic Fleet Weapons Range and the Fleet Marine Force Training area."

Later in 1973 Congress enacted the Military Construction Authorization Act of 1974 (P.L. 93-166, 87 Stat. 668)[110] ap-

[110] "Sec. 204. (a) In order to facilitate the relocation of the ship-to-shore and other gun fire and bombing operations of the United States Navy from the island of Culebra, there is hereby authorized to be appropriated the sum of $12,000,000 for the construction and equipage of substitute facilities in support of such relocation.

propriating $12,000,000 to facilitate "the relocation of the ship-to-shore and other gun fire and bombing operations [from Culebra, and for the] construction and equipage of substitute facilities in support of such relocation." Section 204(b) of this statute then provides that "[t]he relocation of such operations from the northwest peninsula of the island of Culebra is expressly conditioned upon the conclusion of a satisfactory agreement to be negotiated by the Secretary of the Navy . . . with the Commonwealth of Puerto Rico and reported to the Committees on Armed Services of the Senate and the House of Representatives prior to execution of such

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(b) The relocation of such operations from the northwest peninsula of the island of Culebra is expressly conditioned upon the conclusion of a satisfactory agreement to be negotiated by the Secretary of the Navy, or his designee, with the Commonwealth of Puerto Rico and reported to the Committees on Armed Services of the Senate and the House of Representatives prior to execution of such agreement. The agreement shall provide, among other things, that the Commonwealth of Puerto Rico shall insure that (1) Commonwealth lands suitable for carrying out operations of the type referred to in subsection (a) will be made available for the long term continued use of the Atlantic Fleet Weapons Range and Fleet Marine Forces training areas by the Navy, including, but not limited to, present areas and facilities on the Island of Vieques, and (2) any proposed facility or activity which would interfere with the Navy training mission will not be undertaken, including the proposed deep water super-port on the Island of Mona, in the event that such agreement includes the use by the Navy of such island or the area adjacent to such island.

(c) Notwithstanding any other provision of law, the present bombardment area on the island of Culebra shall not be utilized for any purpose that would requirement decontamination at the expense of the United States. Any lands sold, transferred, or otherwise disposed of by the United States as a result of the relocation of the operations referred to in subsection (a) may be sold, transferred, or otherwise disposed of only for public park or public recreational purposes.

(d) The funds authorized for appropriation by the section shall remain available until expended." 87 Stat. 668-669.

agreement." The law further required that this agreement bind the Commonwealth of Puerto Rico to insuring that *Commonwealth lands* suitable to carrying out the relocated operations would be made available for long term continued use of the Atlantic Fleet Weapons Range and the Fleet Marine Forces Training area, "including, but not limited to, present areas and facilities on the Island of Vieques." The agreement also had to have a provision compromising the Commonwealth to refrain from any activity that would interfere with the Navy's training mission, including the building of a then proposed deep water super-port on the island of Mona (which is in the vicinity of Monito and Desecheo island), in the event the agreement included the use of said island or nearby areas.

On June 22, 1974 the Secretary of State, Henry Kissinger, in a confidential memorandum to the Secretary of Defense, informed him that President Nixon had decided to end weapons training activities in Culebra by July 1, 1975 and on the Culebra Cays by December 31, 1975. The Secretary of Defense was directed to consider and select alternative sites. "The selection of the *new* site, if . . . in Puerto Rico, [would] be contingent on its being acceptable to the Commonwealth, and the Secretary of Defense should so inform the Governor of Puerto Rico." (Emphasis supplied).

Although we can well imagine that the above-described sequence is but the "tip of the iceberg" of the many incidents that culminated in the Culebra cease fire, they are the mainstay of Plaintiffs' contentions and the principal sources of evidence on the record.

Considering these events in the most favorable light to Plaintiffs' contentions, we cannot say that they convince us of the existence of any "agreement" on the part of Defendant Navy not to transfer operations to Vieques, even assuming that such an "agreement" would be legally enforceable or that the Plaintiffs would have proper standing to allege its "violation." The very existence and contents of the January 11, 1971 document, which deals with matters of relative unim-

portance and ambiguity, militates against our concluding that Defendant Navy would reach a binding agreement to grant the Commonwealth veto powers over its Vieques exercises, without some specific written document to such effect. When we consider the unquestionable proof that Defendant Navy was at the time carrying out at least some of the Culebra operations also in Vieques, it makes it even more unlikely that they would agree to so seriously compromise the Vieques operations, without a substantial *quid pro quo* that would ensure the continuity of the training operations somewhere.

The above-quoted internal directives of the various members of the Executive, even if we assume them to have been issued at the express order of the President, are not such orders as give rise to a private cause of action. *Zabala Clemente* v. *United States*, 567 F.2d 1140 (C.A.1, 1977), at 1144:

> ". . . Not all acts and orders of the United States government are so sovereign that they must be treated as commands which create legal duties or standards, the violation of which involves breaking the law. A considerable part of the government's conduct is in the context of an employer-employee relationship, a relationship which includes reciprocal duties between the government and its staff, but not necessarily a legal duty to the citizenry."

Furthermore, these directives, as well as the language in the various Appropriation Acts, cannot be taken out of the context of the circumstances surrounding them.

The above-described chain of events demonstrates that the Commonwealth and the Navy were negotiating for *additional Commonwealth lands* in substitution for the Culebra operations, and that eventually agreement could not be reached as to those lands, which more specifically were the islands

of Mona, Monito and Desecheo.[11] Congress appropriated $12,000,000 for the purchase of those islands or similar Commonwealth lands, and it wanted to be sure that if it spent

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[11] The Legislative history of the Military Construction Authorization Act of 1974 reveals the following:

Discussion of §204 commenced in the Senate on September 13, 1973. It was sparsely debated and passed quickly. As passed in the Senate it read

> "Sec.204. In order to permit the execution of an order of the Secretary of Defense, dated May 24, 1973, that the Department of the Navy transfer all Atlantic Fleet Weapons range activities now conducted on or near the island of Culebra to the islands of Desecheo and Monito, not later than July 1, 1975, there is hereby authorized to be appropriated the sum of $12,000,000 for construction of an equipment for substitute facilities, such sums to be available until expended." 119 Cong. Rec. 29651-52 (1973).

On October 11, 1973 the House of Representatives considering the Military Construction Appropriations Act as a whole completely deleted the above section. See House Bill at 119 Cong.Rec. 34200-207. As a result of a conference between committees of the House and Senate a new adjusted authorization bill issued. The Report of the Joint Conference stated the Culebra problem thus:

> "The Senate included in their bill authorization for $12 million to relocate the ship-to-shore and other gunfire and bombing operations of the U.S. Navy from the Island of Culebra. The provision was added during a mark-up without any hearing or testimony being taken in support thereof. The House Bill contained no such provision.
>
> This provision in the Senate bill caused much discussion and debate among the conferees regarding the feasibility of relocating this activity from Culebra to the Islands of Desecheo and Monito. This subject has been the subject of considerable concern in both the House and Senate for the last several years. The House conferees were privileged to have a conference with the Governor of Puerto Rico, the Resident Commissioner and the Mayor of Culebra prior to final conference with Senate conferees.
>
> The restrictive language in Section 204 is a result of discussion with the Governor and others and the conferees believe it provides sufficient protection to the Navy upon relocation of ship-to-shore gunfire operations from Culebra to the other Islands mentioned.
>
> The House receded with an amendment." 119 Cong.Rec. 36857.

these sums in moving from Culebra, the Commonwealth would not do anything in the future to jeopardize these relocated facilities or the "present areas and facilities on the island of Vieques." To interpret the Appropriation Acts as granting the Commonwealth a veto power over Naval operations in Vieques, even assuming its constitutional validity,[112] would not only require a strained construction of these statutes but would, because of the unusual nature of the same, necessitate a more specific mandate to said effect.

It is interesting to note that Plaintiffs have presented no allegation or proof that Defendant Navy has used any of the amounts appropriated pursuant to P.L. 93-166 in the Vieques facilities or otherwise. It would seem that Plaintiffs could

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The result was the Bill as enacted at 87 Stat. 668.

The Legislative History of the Military Construction Appropriations Act of 1970 reveals that as originally passed in the House there was no section regarding the Culebra transfer. 116 Cong.Rec. 16255, at p. 16263; see also p. 16272. On reaching the Senate §611 was added. 116 Cong.Rec. 34041. After a joint conference, the section passed as it now reads at 84 Stat. 1225. 116 Cong.Rec. 36132.

Thus the history of the Appropriation acts clearly shows that Congress was referring to "Commonwealth lands", such as the islands of Monito and Desecheo, and not Vieques which is "Navy lands."

Furthermore, it does reveal that §204 was intended to provide for a two part agreement. The Navy's leaving of Culebra carried with it a *quid pro quo* of transfer to other lands the Commonwealth would help provide. To find that no agreement now exists is just as indicative of the Commonwealth's failure to comply with its part of the bargain behind §204.

[112] Cf. *Springer* v. *Philippine Islands*, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845 (1927); see generally, Dixon, "The Congressional Veto and Separation of Powers: The Executive on a Leash?", 56 N.C.L.Rev. 424 (1978); Leni, "Some Aspects of Separation of Powers", 76 Col.L.Rev. 371 (1976); Note: "Congress, the President, and the Power to Commit Forces to Combat", 81 Harv.L.Rev. 1771 (1968); see also *Buckley* v. *Valeo*, 424 U.S. 1, 120, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

easily have established any such spendings, if in fact they do exist, during the course of their extensive pretrial discovery or by inquiry with the General Accounting Office.[113] Cf. *United States* v. *Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). Conversely, in the Military Construction Authorization Act of 1976 (P.L. 94-107, 89 Stat. 551), Congress authorized the Secretary of the Navy to "establish or develop military installations and facilities by acquiring, constructing, converting, rehabilitating, or installing permanent or temporary public works, including land acquisition, site preparation, appurtenances, utilities, and equipment for the following acquisition and construction: . . . Atlantic Fleet Weapons Range, Roosevelt Roads, Puerto Rico, $2,128,000." That statute did not otherwise restrict the nature of the spending. See also, Military Construction Authorization Act, 1979 (P.L. 95-356, 92 Stat. 565, at 570).

Furthermore, the evidence of a "transfer" from Culebra to Vieques is far from clear. Although the record shows that some improvements were made to the Inner Range facilities in Vieques after 1975, not only are these relatively minor in nature, but none were to establish new targets, all of which were in existence prior to 1975.[114] Although there is no question in our mind but that there was an increase in the intensity of operations at Vieques after 1975, this in itself

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[113] See 31 U.S.C. §103.

[114] Target One (October, 1971); strafe target (October, 1971); Target Two (October, 1971); NGFS targets (November, 1973); helicopter past and observation post at Cerro Matías (December, 1969); microwave communication and electronic warfare radar simulator at Cerro Matías (July, 1974); helicopter pad and electronic warfare radar-simulator at Monte Pirata (December, 1975); T.V. Bomb scoring facilities at Cerro Matías (November, 1976); radar for ship positioning and bomb scoring on Cerro Matías (May, 1977); shelters for patrol boats in East Vieques (September, 1976); boat ramps in east Vieques (September, 1978).

demonstrates that these operations were already taking place in Vieques prior to the Culebra closing.[115]

All of these statistics may be interesting reading, but they really are immaterial to the present issue.[116] Whether or not a transfer as such took place, the same cannot be the basis for a cognizable claim in this Court based on either the First or Fifth Amendment, as Plaintiffs have not shown that any such transfer has infringed any cognizable property interest or constitutional right,[117] particularly in view of our findings which negate the existence of an enforceable agreement or mandate.

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[115]

Artillery	Last 6 Months in 1973	1974	1975	1976	1977	First 6 Months 1978
Hours	324.1	387.4	272.7	289.0	39.6	132.0
Rounds	2297	29080	13266	8367	225	Not available
Days	20	83	24	26	5	6
Naval Gunfire						
Hours	202.5	644.4	669.4	715.0	1016.9	559.7
Rounds	2099	7200	8265	7040	8700	3816
Ships	33	91	74	73	97	39
Days	39	95	85	88	115	49
Air-to-Ground						
Hours	137.9	159.3	362.6	484.4	1518.1	819.9
Rounds	33779	49052	59219	30801	107,206	100,196
Sorties	861	309	1638	1141	3438	1924
Days	42	38	92	92	100	63

[116] They may have a bearing to matters discussed later in this Opinion. See Section IV K.

[117] That a cause of action may lie under either the First, *Paton* v. *La Prade*, 524 F.2d 862 (C.A.3, 1975), or the Fifth Amendment, *Jacobson* v. *Tahoe Regional Planning*, 566 F.2d 1353 (C.A.9, 1977), rev'd in part sub nom. *Lake County Estates Inc.* v. *Tahoe Regional Planning Agency, Inc.*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979), does not relieve a Plaintiff of the burden of establishing the requisite property right, *Roth* v. *Board of Regents*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), or other protected constitutional interests. *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). See also: *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

B. The restriction of waters in the vicinity of Vieques

Plaintiffs Medina et al. and Zenon et al. contend that the restrictions of certain areas of the surrounding waters of Vieques, previously described, interfere with their personal rights and are contrary to the "Foraker Act", 48 U.S.C. §746 and the Federal Relations Act, 48 U.S.C. §731 *et seq.*

Article I, §8, Clause 3 of the United States Constitution accords to the Congress the power: "To regulate Commerce with foreign Nations and among the several states and with the Indian Tribes." Chief Justice Marshall laid down the broad outlines of the commerce power in *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 195, 6 L.Ed. 23 (1824):

> "We are now arrived at the inquiry — what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."

In 1865, the Supreme Court in *Gilman* v. *Philadelphia,* 70 U.S. (3 Wall.) 713, 724, 18 L.Ed. 96, ruled that navigable waters are public property of the Nation:

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose and to the extent necessary of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the Nation and subject to all the requisite legislation by Congress."

Further, the Supreme Court has consistently maintained that, insofar as the control over commerce was concerned, more specifically the Commerce Clause, *plenary power* remained in Congress. See, *National League of Cities* v. *Usery,* 426 U.S. 833, 840, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976); *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726 (1942).

The military's operational restrictions at Vieques were issued by the authority of the Secretary of the Army under the Rivers and Harbors Act of 1889, 33 U.S.C. §1 *et seq.*[118] Sections 1 and 3 of Title 33 grant the authority to restrict access to waters in areas like Vieques. Generally, they commend to the sound judgment of the Secretary decisions on whether navigable waters should be restricted. His judgment is to be founded upon what "the public necessity may require for the protection of life and property." 33 U.S.C. §1. The statute also provides for the issuance of Secretarial regulations, "[i]n the interest of the national defense, and for the better protection of life and property on the navigable waters of the United States" for waters under the jurisdiction of the United States likely to be endangered by target practice. 33 U.S.C. §3.

As previously indicated in this opinion, the pertinent regulations respecting the target range at Vieques Island are promulgated at 33 C.F.R. §204.234, establishing the danger zone, and 33 C.F.R. §207.815, establishing the restricted areas. On their face they are properly issued and fall within the purview of 33 U.S.C. §§1 and 3.

Nowhere have Plaintiffs shown that these restrictions operate to unreasonably restrict the waters from fishing and other activities. The two areas of restricted waters — the one, off the coast in the area of the Naval Ammunition Facility, and the other, off the coast in the Camp García area — extend only 1,500 yards offshore. As previously stated, the danger area around the eastern end of Vieques is activated only at times when the range is in operation. Fishermen's notices indicate the schedule of range activities for the following week, designating the areas to be closed and time periods of range activation. Fishing is permitted at all other times.

The Plaintiffs herein have presented absolutely no evidence that Defendant Navy has impermissibly or unilateral-

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[118] The Secretary of the Army is not named as a defendant herein.

ly expanded the areas authorized as a danger zone (33 C.F.R. §204.234) or a restricted area (33 C.F.R. §207.815). The navigable waters contiguous to Defendant Navy's weapons training range at Vieques are navigable waters of the United States, and they have been restricted in exactly the manner intended by law and regulations. The Plaintiffs' representation that the Federal Relations Act, 48 U.S.C. §731 *et seq.*, negates Defendant Navy's right to operate in this area are based on a misreading of that law and are contrary to §§734 and 749 of the same. See *PFZ Properties, Inc.* v. *Train,* 393 F.Supp. 1370, 1382 (D.D.C., 1975). The waters of Vieques are legitimately restricted by the sovereign in order to protect Plaintiffs' "life and property." Cf. *United States* v. *Mowat,* 582 F.2d 1194, 1205 (C.A.9, 1978), cert. den. 439 U.S. 967, 99 S.Ct. 458, 58 L.Ed.2d 426 (1939).

Since Plaintiffs have failed to demonstrate that the above restrictions are unreasonable, it is unnecessary for this Court to reach Plaintiffs' Fifth Amendment taking claims. Again, however, Plaintiffs have failed to demonstrate any property interest of theirs which has been invaded, and indeed, they have none (see *Feliciano,* supra, at 1363-1364), particularly since no one has a property interest capable of being "taken" under the Fifth Amendment, in the fish in the sea. *Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 284, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977).

Finally, the Plaintiffs Romero Barceló et al. and Medina et al., allege that the United States military operations on the Island of Vieques constitute a denial of freedom of travel as guaranteed by the First Amendment of the United States Constitution. *Feliciano,* supra, at 1364 and 1365, is dispositive of these claims of purported loss of personal liberties. See also, *Kreitzer* v. *Puerto Rico Cars, Inc.,* 417 F.Supp. 498, 506 (D.P.R.1975), aff'd. 535 F.2d 140 (C.A.1, 1976). The evidence presented at trial demonstrates clearly that there is no significant restriction on travel or on use of the beaches around Vieques, particularly when we compare it with the factual situation that existed in the *Feliciano* case.

C. Allegations that raise non-justiciable "political questions"

Plaintiffs have contended that the training conducted at or around Vieques could be carried out at some other location or that the type of training could be changed or reduced, all without harm to the National defense. Further in line with this position Plaintiffs have steadfastly contended that these are matters that should be considered by the Court in this case. In our view, questions dealing with the level and type of training required to maintain the Navy at an adequate level of efficiency, or the determination of the relative merits of various training sites or similar issues, are purely "political" questions which are not justiciable unless we are concerned with whether specific legal standards have been violated (ex., whether the level of training violates environmental laws).

Although the principle of nonjusticiability is not expressly stated in the Constitution, it derives in part from the doctrine of separation of powers. Provision for the National defense is the responsibility of the executive and legislative branches:

> "The President shall be Commander in Chief of the Army and Navy of the United States . . ." U.S. Const., Art. II §2, cl. 1.
>
> "The Congress shall have Power . . . To Declare War . . . To Raise and support Armies . . . To provide and maintain a Navy . . ." U.S. Const., Art. I, §8, cls. 12-14.

Obviously, not every matter affecting the armed forces presents nonjusticiable issues. But there are instances when sound judicial policy dictates restraint. One of these instances is when the controversy presents a "political question." Chief Justice Marshall perhaps best expressed the role of the judiciary in this regard: "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803).

The contours of a political question have been well defined by the Supreme Court:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker* v. *Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).

Under the aforementioned criteria, determinations regarding the level, type, and efficacy of naval training present "political" questions. Maintenance and directions of the Navy is constitutionally committed to Congress and the President. There is an obvious lack of standards which a court could employ to make its own determination concerning training. Parenthetically, how would a court determine what training is needed or whether particular training is accomplishing its goal? See *United States* v. *American Telephone and Telegraph Company*, 179 U.S.App.D.C. 198, 204, 551 F.2d 384, 390 (D.C. Cir., 1976). In fact, how would a court decide what was the desired state of readiness without an initial policy determination from the branches of our government responsible for the conduct of our Nation's foreign affairs? See *Mitchell* v. *Laird*, 159 U.S.App.D.C. 344, 349, 488 F.2d 611, 616

(D.C. Cir., 1973); *Pauling* v. *McNamara*, 118 U.S.App.D.C. 50, 52-3, 331 F.2d 796, 798-9 (D.C. Cir., 1964), cert. den. 377 U.S. 933, 84 S.Ct. 1336, 12 L.Ed.2d 297 (1964). Obviously, the independent resolution of such matters by the court would not express the respect due coordinate branches of government that are charged with the resolution of such matters. There would result not only embarrassment in the area of foreign relations if judicial pronouncements varied with the studied opinion of those to whom the Nation's defense is entrusted, but also a possibility of real harm if our allies question our ability to train our forces and our enemies interpret such contradictions as a sign of military weakness. The importance of this last consideration has been judicially recognized:

> "The decision of the Secretary of War is not open to judicial inquiry. That is fortunate, for if it were open, the ensuing delay would delight our country's enemies." *United States* v. *243.22 Acres of Land*, 129 F.2d 678, 683 (2d Cir., 1942). See also *Commonwealth of Massachusetts* v. *Laird*, 451 F.2d 26 (1st Cir., 1971); *Curran* v. *Laird*, 136 U.S.App.D.C. 280, 287, 420 F.2d 122, 129 (D.C. Cir., 1979).

The Supreme Court has acknowledged on numerous occasions that, in military matters, constitutional provisions have engendered a judicial rule of nonreviewability founded on the concept of separation of powers:

> "But judges are not given the task of running the Army . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters." *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94, 73 S.Ct. 534, 540, 97 L.Ed. 842 (1953).
>
> "[I]t is difficult to conceive of an area of governmental acitvity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, sub-

ject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system." *Gilligan* v. *Morgan*, 43 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973).

"The responsibility for determining how best our Armed Forces shall attend to [the business of fighting or being ready to fight wars] rests with Congress, see U.S. Const., Art. I, §8, cls. 12-14, and with the President." See U.S. Const. Art. II, §2, cl. 1. *Schlesinger* v. *Ballard*, 419 U.S. 498, 510, 95 S.Ct. 572, 578, 42 L.Ed.2d 610 (1975).

See also *United States* v. *MacIntosh*, 283 U.S. 605, 622, 51 S.Ct. 570, 75 L.Ed. 1302 (1931); *Bertelsen* v. *Cooney*, 213 F.2d 275, 277 (5th Cir., 1954), cert. den., 348 U.S. 856, 75 S.Ct. 81, 99 L.Ed. 674, rehearing denied, 348 U.S. 890, 75 S.Ct. 205, 99 L.Ed. 699 (1954); *Simmons* v. *United States*, 406 F.2d 456, 459 (5th Cir., 1969); *Feliciano* v. *United States*, supra, at 1366.

"Trained professionals, subject to the day-to-day control of responsible civilian authorities, necessarily must make conparative judgments on the merits as to evolving methods of training, equipping and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility in the unlikely event he possessed requisite technical competence to do so." *Gilligan* v. *Morgan*, 413 U.S. at p. 8, 93 S.Ct. at 2445.

K. The Environmental Impact Statement and the National Environmental Policy Act

Plaintiffs claim that Defendant Navy is in violation of the National Environmental Policy Act of 1969, 42 U.S.C.

§4321 *et seq.* (hereinafter called "NEPA"), because it has failed to prepare an environmental impact statement ("EIS") as allegedly required by Section 102(2)(C) of said statute. Defendant Navy's defense is two-fold: (1) that Plaintiffs are barred from bringing this action by the doctrine of laches, and (2) that Defendant Navy is not in violation of NEPA. The Statute establishes as follows: (42 U.S.C. §4332):

> "The Congress authorizes and directs that, to fullest extent possible: (1) . . . (2) all agencies of the Federal Government shall —
>
> * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action;
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statements, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made

> available to the President, the Council on Environmental Quality and to the public as provided by Section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . ."

A determination of the issues raised herein requires a multi-stepped analysis, the threshold of which is a decision as to whether there is before us a recommendation or report on proposals for (1) legislation, or (2) major federal action. Only if either of these two matters is in question are we required to determine whether said proposal or report significantly affects the quality of the human environment. *Andrus* v. *Sierra Club*, _____ U.S. _____, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976).

Because we are quite clearly not concerned with any proposed legislation, annual appropriation bills having been definitively excluded by *Andrus* v. *Sierra Club*, supra, from such a contention, we can immediately lay that possibility to rest.

We thus come to a determination of whether Defendant Navy's activities in Vieques are a "recommendation or report on proposals for . . . major Federal actions." This literal approach, however, places a mistaken emphasis on the present day activities rather than on how they were promulgated.

First of all, it is obvious that Defendant Navy's activities in Vieques are the *product* of "recommendation[s] or report[s] on proposals for . . . major federal action." Secondly, the magnitude of the capital investment as well as the over-all nature of the present day activities characterize them as "major." *Jackson County, Missouri* v. *Jones*, 571 F.2d 1004 (C.A.8, 1978); *Sierra Club* v. *Hodel*, 544 F.2d 1036 (C.A.9, 1976); *City of Rochester* v. *United States Postal System*, 541 F.2d 967 (C.A.2, 1976); *McDowell* v. *Schlesinger*, 404 F.Supp. 221 (W.D. Mo.1975); *Prince George's County, Maryland* v. *Holloway*, 404 F.Supp. 1181 (D.C.D.C. 1975);

Julis v. *City of Cedar Rapids, Iowa,* 349 F.Supp. 88 (D.C.Iowa 1972).

Although the proposals for much of this action predates the passage of NEPA in 1969, the Vieques operation is in effect part of an on-going project which admittedly, has never been the subject of an EIS. In our opinion, the on-going activities must be the subject of an EIS notwithstanding that the proposals for said actions may have originated in part, prior to 1969, because it is clear that Congress did not intend to exempt pre-NEPA recommendations if they have post NEPA impacts. *Lathan* v. *Brinegar,* 506 F.2d 677, 689 (C.A.9, 1974); *Life of the Land* v. *Brinegar,* 485 F.2d 460, 466 (C.A.9, 1973), cert. den. 416 U.S. 961, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974); *Jones* v. *Lynn,* 477 F.2d 885, 889 (C.A.1, 1973). See S. Report No. 91-296, 91st Cong., 1st Sess. 21 (1969); 40 C.F.R. 1500.13; Cf. *TVA* v. *Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

Considering that Section 102(2)(C) of NEPA, requires the filing of an EIS only if the Federal actions "significantly [affect] the quality of the human environment", and less our present ruling be misconstrued when considered with prior findings in this case (which in synthesis hold that Defendant Navy's activities do not generally run contrary to the various environmental statutes that have been raised by Plaintiffs), we specify that our present ruling is based on the regulations enacted to implement NEPA.

The regulations of the Council on Environmental Quality, in identifying major actions significantly affecting the environment, state (40 C.F.R. 1500.6(a)):

> "The statutory clause 'major federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. Such actions may be localized in their impact, but if there is *potential* that the environment may be

> significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is *likely to be highly controversial*, should be covered in all cases . . ." (Emphasis supplied).

The regulations promulgated by the Department of Defense in compliance with NEPA, in identifying major actions significantly affecting the quality of the human environment, indicate (32 C.F.R. 214.7(a)).

> ". . . In making a judgment in a particular case, it will be necessary for the proponent of the action to assess the expected environmental effects of the actions in conjunction with the intent of the National Environmental Policy Act (NEPA) as implemented by the Council on Environmental Quality (CEQ). It is essential that all the environmental effects of an action be assessed, whether those effects are adverse or beneficial. In determining whether or not the effects of an action are significant, the proponent must evaluate the nature and degree of all effects on the environment. *These may be significant even though the environmental effect of the proposed action will be beneficial.* (Emphasis supplied).

Contra: *Hanly* v. *Kleindienst*, 471 F.2d 823, 830 (C.A.2, 1972), cert. den. 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed.2d 974 (1973); *Cross-Sound Ferry Services, Inc.* v. *United States*, 573 F.2d 725, 731 (C.A.2, 1978).

At the very least, Defendant Navy is required to show that it adequately consulted with other agencies, and must establish a reviewable environmental record to support its threshold negative determination as to the necessity for preparing an EIS, if that be the case. *Friends of the Earth* v. *Butz*, 406 F.Supp. 742 (D.Mont.1975), rem. for mootness 576 F.2d 1377 (C.A.9, 1978); *Mid-Shiawassee Cty. Concerned Citizens* v. *Train*, 408 F.Supp. 650 (E.D.Mich.1976), aff'd 559 F.2d 1220 (C.A.6, 1977); *Sierra* v. *Morton*, 169 U.S.App.D.C. 20, 514 F.2d 856 (C.A.D.C.1975), *cert. dism.* 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 105 (1976), rev. on

other grds. 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976); *Maryland-National Capital Park and Planning Commission* v. *U.S. Postal Service*, 159 U.S.App.D.C. 158, 487 F.2d 1029 (C.A.D.C.1973); *Arizona Public Service Co.* v. *Federal Power Commission*, 157 U.S.App.D.C. 272, 483 F.2d 1275 (C.A.D.C.1973); *Smith* v. *City of Cookeville*, 381 F.Supp. 100 (D.C.Tenn.1974).

The issue of laches is properly a question to be dealt with in connection with the appropriateness of the remedy, rather than substantively.

V. The Remedy

The Court has found:

(1) That Defendant Navy is in violation of the Federal Water Pollution Control Act, *supra*, by reason of its lack of a NPDES permit to cover the occasional release or firing of ordnance into the waters of Vieques,

(2) That Defendant Navy is in violation of Executive Order 11593, *supra*, by reason of its failure to nominate to the Secretary of the Interior various sites in Vieques that may be eligible for listing in the National Register of Historic Places, and/or by its failure to seek the opinion of the Secretary respecting said eligibility, and

(3) That Defendant Navy is in violation of the National Environmental Policy Act, supra, by its failure to file an environmental impact statement in connection with its activities in and around Vieques.

Plaintiffs urge the issuance of an injunction against Defendant Navy prohibiting further military activities in Vieques until such time as there is compliance with all such violations.

The issuance of an injunction in the federal courts is governed by general principles of equity. *Stringer* v. *United States*, 471 F.2d 381, 384 (C.A.5, 1973), cert. den. 412 U.S. 943, 93 S.Ct. 2775, 37 L.Ed.2d 404 (1973). See generally, "Developments in the Law-Injunctions", 78 Harv.L.Rev. 994 (1965).

Perhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief, is the court's discretion. Being an extraordinary remedy, it is not granted routinely.

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . *The historic injunctive process was designed to deter, not to punish.* The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied."

Hecht Co. v. *Bowles*, 321 U.S. 321, 329-330, 64 S.Ct. 587, 591-592, 88 L.Ed. 754 (1944), cited in *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61, 95 S.Ct. 2069, 45 L.Ed.2d 12 (1975), emphasis added in that case.

> "In shaping equity decrees, the trial court is vested with broad discretionary power . . . Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' . . .
>
> "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots."

Lemon v. *Kurtzman*, 411 U.S. 192, 200-201, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1973). See *Brown* v. *Board of Education*, 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

If this balancing of competing interests is required where constitutional rights are at stake, can it be seriously argued that this Court should have a different standard where statutory matters are at issue? We think not. See *Essex County Preservation Association* v. *Campbell*, 536 F.2d 956, 962 (C.A.1, 1976); *Aluli* v. *Brown*, 437 F.Supp. 602, 611 (D.C.Haw.1977), rev. in part, 602 F.2d 876 (C.A.9, 1979); *State of New York* v. *Nuclear Regulatory Commission*, 550 F.2d 745, 753-754 (C.A.2, 1977); *Ohio* v. *Callaway*, 497 F.2d 1235 (C.A.6, 1974); *Conservation Society of Southern Vermont* v. *Secretary of Transportation*, 508 F.2d 927 (C.A.2, 1974), vacated on other grounds and remanded, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975); *Environmental Defense Fund, Inc.* v. *Froehlke*, 477 F.2d 1033 (C.A.8, 1973).

The courts in construing environmental statutes such as NEPA have consistently suggested that the relief afforded be a product of balancing of equities. See *Silva* v. *Romney*, 473 F.2d 287 (C.A.1, 1973); *Environmental Defense Fund, Inc.* v. *Armstrong*, 352 F.Supp. 50 (N.D.Cal.1972), aff'd 487 F.2d 814 (C.A.9, 1973), cert. den. 416 U.S. 974, 94 S.Ct. 2002, 40 L.Ed.2d 564 (1973), reh. den. 419 U.S. 1041, 95 S.Ct. 530, 42 L.Ed.2d 319 (1974); *Minnesota Public Interest Research Group* v. *Butz*, 358 F.Supp. 584, 625 (D.Minn.1973), aff'd 498 F.2d 1314 (C.A.8, 1974) (*en banc*); *East 63rd Street Association* v. *Coleman*, 414 F.Supp. 1318, 1329 (S.D.N.Y.1976), aff'd by order 538 F.2d 309 (C.A.2, 1976); Cf. *Flint Ridge Dev. Co.* v. *Scenic Rivers Assn.*, 426 U.S. 776, 787-788, 96 S.Ct. 2430, 49 L.Ed.2d 205 (1976) reh. den. 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed.2d 159 (1976); *Aluli* v. *Brown*, supra.

There are various reasons why injunctive relief is not the appropriate remedy in this case.

To begin with, it is clear in our mind, as previously expounded in this opinion, that the activities of Defendant Navy are not causing any appreciable harm to the Vieques ecology. *Aluli* v. *Brown*, supra, at page 611. The violations which we have found, are in substance technical violations, which must

be cured, but do not require the drastic treatment suggested by Plaintiffs. Furthermore, there does not appear any reason why their rectification can not be accomplished in a relatively short period of time. Nor is there any logical connection between the accomplishment of this purpose and ordering a halt to the activities of Defendant Navy, other than as punishment, a purpose for which injunctive relief is not appropriate. See *Hecht Co.* v. *Bowles*, supra.

Additionally, the Court should take into consideration the delay by Plaintiffs in asserting their claims, as laches has been recognized to be a valid defense to similar suits. See *Ecology Center of Louisiana, Inc.* v. *Coleman*, 515 F.2d 860, 867 (C.A.5,1975); *Minnesota Public Interest Research Group* v. *Butz*, supra, p. 619; *Mansfield Area Citizens Group* v. *United States*, 413 F.Supp. 810 (D.C.Pa.1976); *Commonwealth of Pennsylvania* v. *Federal Maritime Commission*, 392 F.Supp. 795, 803 (D.C.D.C.1975); *Save Our Wetlands Inc.* v. *U. S. Army Corps. of Engineers*, 549 F.2d 1021, 1026 (C.A.5, 1977), reh. den. 553 F.2d 100 (C.A.5, 1977), cert. den. 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977); *Sierra Club* v. *Cavanaugh*, 447 F.Supp. 427 (D.S.D.1978); *Woida* v. *United States*, 446 F.Supp. 1377 (D.C.Minn.1978); *Dalsis* v. *Hills*, 424 F.Supp. 784, 788 (D.C.N.Y.1976); *Organizations United for Ecology* v. *Bell*, 446 F.Supp. 535 (M.D.Pa.1978); *Shiffler* v. *Schlesinger*, 548 F.2d 96, 103 (C.A.3, 1977); *Centerview/Glenn Avalon Homeowners Association* v. *Brinegar*, 367 F.Supp. 633, 639 (C.D.Cal. 1973); *National Association of Government Employees* v. *Rumsfeld*, 418 F.Supp. 1302, 1304 (E.D.Pa.1976); *Smith* v. *Schlesinger*, 371 F.Supp. 559, 561 (C.D.Cal.1974); *City of Rochester* v. *United States Postal Service*, 541 F.2d 967 (C.A.2, 1976); *Friends of Yosemite* v. *Frizzel*, 420 F.Supp. 390, 397 (N.D.Cal.1976); *Iowa Student Public Interest Research Group* v. *Callaway*, 379 F.Supp. 714, 720 (S.D.Iowa 1974). In the present case, Plaintiffs have waited more than eight years since NEPA was enacted in 1969, more than six years since the Federal Water Pollution Control Act was enacted in 1972, and approximate-

ly seven years since Executive Order 11593 was promulgated, before filing the present actions notwithstanding that Defendant Navy has been conducting training operations in Vieques since World War II, and in its present intensity, since at least 1975. Plaintiffs' sudden awakening to rights that they have had for such long periods of time can not bring about a halt, and consequent disruption, to activities that have been taking place for at least an equal length of time. Although Plaintiffs' laches should not totally bar their claim we are of the opinion that it strongly militates against the granting of injunctive relief at present.

Lastly, we have not the slightest doubt but that the granting of the injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this Nation. It is abundantly clear from the evidence in the record, as well as by our taking judicial notice of the present state of World affairs, that the training that takes place in Vieques is vital to the defense of the interests of the United States.

From an economic and defense standpoint, the United States is an island which must import 90% of its strategic materials over the sea lanes of the World. Petroleum is the single most important commodity moved by sea, the primary sources in the Atlantic seaboard being the Middle East, and secondarily, South America. These sea lanes are also of vital importance in allowing the United States to meet its international obligations with 41 of the 43 nations with which it has mutual defense treaties.

Thus, our ability to maintain a well trained and effective naval force, even in time of peace, is essential to the National welfare.[119]

The Atlantic Fleet is responsible for providing naval forces throughout a geographic area that extends from as far

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[119] Considering the experience of the residents of Puerto Rico during the blockade in World War II, the ability to maintain free sea lanes to and from the Mainland would seem of some interest to the residents of this Commonwealth.

north as the Arctic, to as far south as the Antarctic, as far east as Turkey and as far west as Mexico. These naval forces include air, submarine, surface, and Marine landing forces, all of which the Atlantic Fleet must combine and integrate. Because of allocated resources, and the extensive geographical area they must protect, these forces are at best marginal, and it is thus imperative that they be kept at the highest state of training possible.

Atlantic Fleet operations are centered around carrier-based high-performance attack aircraft, which according to expert testimony, is the only area wherein United States' naval forces outnumber those of our prospective adversaries. The training of these forces is a three-stage affair: the first six months, which takes place when a carrier returns from a cruise, is taken up with shore leave, maintenance, equipment installation, and the training of the ship's personnel to operate as a platform for aircraft. During this period most of the aircraft are shore-based. During the next six-months the air wing is embarked on the ship and the training is directed towards coordinating the airwing and the ship as a team. It is during this period that the ship is put through the full range of simulated combat conditions, including combined exercises with other components of the Atlantic Fleet, to bring it up to standards for actual deployment during the last 6-8 months of the training cycle.

The island of Vieques is the only place presently available wherein the Atlantic Fleet can conduct the full range of exercises under conditions similar to simulated combat. It is the only place which possesses the potential or existing capability to conduct combined exercises involving air-to-ground ordnances delivery, Marine amphibious assaults, anti-submarine warfare, surface-to-air missiles, close support bombardment, and electronic warfare; in short everything that a battle group would undertake to secure our sea lanes from interdiction by hostile forces. Furthermore, being that the ultimate mission in combat is the delivery of live ordnance to the enemy, it is an essential element of training that the personnel be fully expos-

ed to its use, both psychologically and in terms of actual skills. Vieques is the only location presently available wherein this training can be conducted within permissible peace time parameters.

Considering all of the above, the Court is of the opinion that under the present circumstances the continued use of Vieques by Defendant Navy for naval training activities is essential to the defense of the Nation and that the enjoining of said activities is not an appropriate relief for the correction of the cited statutory violations. Other remedy shall be fashioned. *Lemon* v. *Kurtzman*, supra.

Wherefore, it is ORDERED, that Defendant Navy, "with all deliberate speed", (*Brown* v. *Board of Education*, supra, 349 U.S. at page 301, 75 S.Ct. 753), proceed to:

1. File for and seek a NPDES permit for the release of firing of ordnance into the waters of Vieques;

2. Nominate to the Secretary of the Interior sites in Vieques that may be eligible for listing in the National Register of Historic Places, and/or seek the opinion of the Secretary respecting said eligibility, and further, take appropriate action for the protection of any such prospective sites pending decision as to their eligibility; and

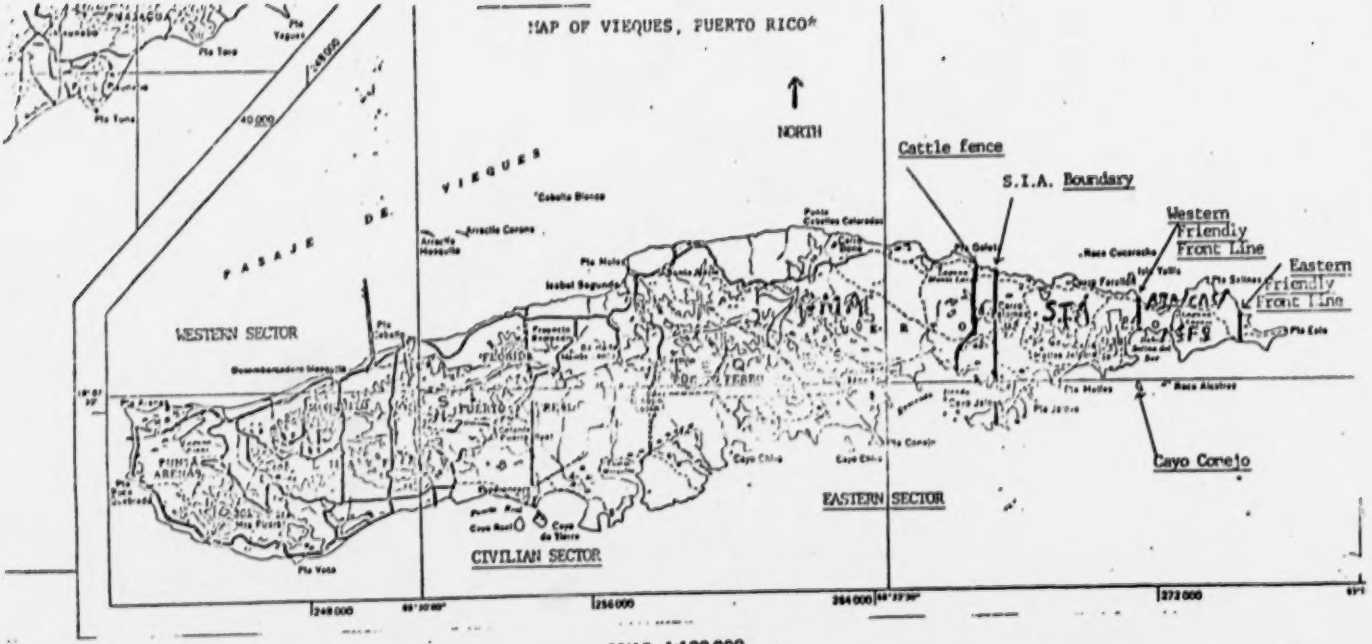
3. Comply with the provisions of 42 U.S.C. §4332(C).

All other claims are dismissed as well as all claims against Defendants in their individual capacities and against John Doe, Defendants.

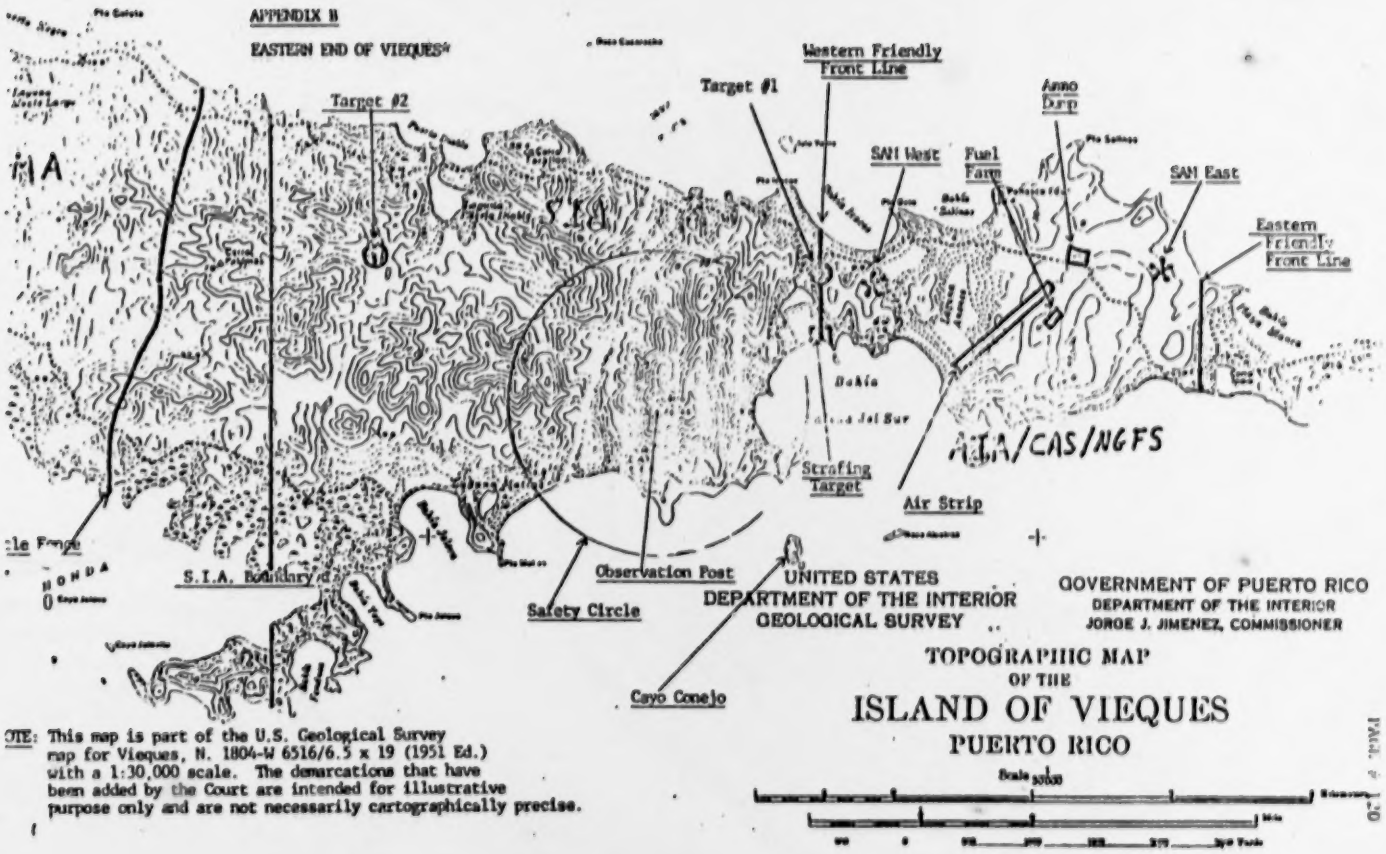
A status conference shall be held before the United States Magistrate within 20 days for the establishment of a written time table for compliance with this Order, which time table shall be subject to the approval of the Court.

IT IS SO ORDERED.

Appendix to follow.



*NOTE: This map is part of the U.S. Geological Survey Map for Puerto Rico and Surrounding Islands, 1951, and has a scale of 1:120,000. The demarcations that have been added by the Court are intended for illustrative purposes only and are not necessarily cartographically precise.



*NOTE: This map is part of the U.S. Geological Survey map for Vieques, N. 1804-W 6516/6.5 x 19 (1951 Ed.) with a 1:30,000 scale. The demarcations that have been added by the Court are intended for illustrative purpose only and are not necessarily cartographically precise.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1626

CARLOS ROMERO-BARCELLO, ETC., ET AL.,
Plaintiffs, Appellants,

CARLOS ZENON, ET AL.,
Plaintiffs-Intervenors, Appellees,

v.

HAROLD BROWN, ET AL., *Defendants, Appellees.*

Before COFFIN, *Chief Judge,*
CAMPBELL and BOWNES, *Circuit Judges*

ORDER OF COURT

Entered February 27, 1981

The petition for rehearing filed by Carlos Romero-Barcelo, et al and the petition for rehearing filed by the Secretary of Defense are hereby denied.

By the Court:

DANA H. GALLUP
Clerk.

APPENDIX E

Statutes Involved

The Administrative Procedure Act, Section 2(g), 5 U.S.C. §551 (1976) provides:

* * *

(13) "agency action" includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Section 10 of the Administrative Procedure Act, 5 U.S.C. §701(a) (1976) provides in pertinent part:

(a) This chapter applies, according to the provisions thereof, except to the extent that —

(1) statutes preclude judicial review, or

(2) agency action is committed to agency discretion by law.

Section 10(a) of the Administrative Procedure Act, 5 U.S.C. §702 (1976) provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 10(c) of the Administrative Procedure Act, 5 U.S.C. §704 (1976) provides:

Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. §706 (1976) provides in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> * * *

The Military Construction Authorization Act of 1971, Pub. L. No. 91-511, 84 Stat. 1204 (1970), in pertinent part reads as follows:

> Sec. 611. (a) The Secretary of Defense is directed to undertake a study and to prepare a report on the weapons training now being conducted in the Culebra complex of the Atlantic Fleet Weapons Range. This study shall consider all possible alternatives, geographical and technological, to the training now taking place in the Culebra complex, and shall contain specific recommendations for, together with the estimated costs of, moving all or a part of such activities to a new site or sites, and appropriately modifying such activities to minimize danger to human health and safety.
>
> (b) In preparing the report required by this section, the Secretary shall consult with the people of Culebra, the

Government of Puerto Rico, and all appropriate Federal agencies having jurisdiction or special expertise on the subject matter involved. The report required by this subsection shall be transmitted to the President of the United States and to the chairmen of the Committees on Armed Services of the Senate and the House of Representatives no later than April 1, 1971.

(c) Pending the completion of the report required by this section and its review by the President of the United States, the appropriate committee and the Congress, the Department of the Navy is directed to avoid any increase or expansion of the present weapons range activities in the Culebra complex and, wherever possible, without degrading the activities, to institute procedures which will minimize interference with the normal activities and the solitude of the people of Culebra.

The Military Construction Authorization Act of 1972, Pub. L. No. 92-145, 85 Stat. 394 (1971), in pertinent part reads as follows:

Sec. 207. (a) The Secretary of Defense is directed to prepare a detailed feasibility study of the most advantageous alternative to the weapons training now being conducted in the Culebra Complex of the Atlantic Fleet Weapons Range. The Secretary shall determine the most advantageous alternative on the basis of investigations which consider cost, national security, the operational readiness and proficiency of the Atlantic Fleet, the impact on the environment, and other relevant factors.

(b) The detailed feasibility study authorized by subsection (a) of this section shall be completed by December 31, 1972. Upon completion of the feasibility study, a report summarizing the study results together with the Secretary's recommendations shall be transmitted to the President of the United States and to the chairmen of the Committees on Armed Services of the Senate and the House of Representatives.

The Military Construction Authorization Act of 1974, Pub. L. No. 93-166, 87 Stat. 611 (1973), in pertinent part reads as follows:

> Sec. 204. (a) In order to facilitate the relocation of the ship-to-shore and other gun fire and bombing operations of the United States Navy from the island of Culebra, there is hereby authorized to be appropriated the sum of $12,000,000 for the construction and equipage of substitute facilities in support of such relocation.
>
> (b) The relocation of such operations from the northwest peninsula of the island of Culebra is expressly conditioned upon the conclusion of a satisfactory agreement to be negotiated by the Secretary of the Navy, or his designee, with the Commonwealth of Puerto Rico and reported to the Committees on Armed Services of the Senate and the House of Representatives prior to execution of such agreement. The agreement shall provide, among other things, that the Commonwealth of Puerto Rico shall insure that (1) Commonwealth lands suitable for carrying out operations of the type referred to in subsection (a) will be made available for the long term continued use of the Atlantic Fleet Weapons Range and Fleet Marine Forces training areas by the Navy, including, but not limited to, present areas and facilities on the island of Vieques, and (2) any proposed facility or activity which would interfere with the Navy training mission will not be undertaken, including the proposed deep water superport on the island of Mona, in the event that such agreement includes the use by the Navy of such island or the area adjacent to such island.

Section 4 of the Noise Control Act of 1972, 42 U.S.C. §4903 (1976), in pertinent part reads as follows:

> (a) The Congress authorizes and directs that Federal agencies shall, to the fullest extent consistent with their authority under Federal laws administered by them, carry out the programs within their control in such a manner as to further the policy declared in section 4901(b) of this title.

(b) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government—

(1) having jurisdiction over any property or facility, or

(2) engaged in any activity resulting, or which may result, in the emission of noise

shall comply with Federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements . . . .

Section 12 of the Noise Control Act of 1972, 42 U.S.C. §4911 (1976), in pertinent part reads as follows:

(a) Except as provided in subsection (b) of this section, any person (other than the United States) may commence a civil action on his own behalf—

(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any noise control requirement (as defined in subsection (e) of this section), . . .

* * *

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any noise control requirement or to seek any other relief (including relief against an Administrator).

(f) For purposes of this section, the term "noise control requirement" means paragraph (1), (2), (3), (4), or (5) of section 4909(a) of this title, or a standard, rule, or regulation issued under section 4916 or 4917 of this title or under section 1431 of Title 49.

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No. 80-2033

In the Supreme Court of the United States

OCTOBER TERM, 1980

CARLOS ROMERO-BARCELO, GOVERNOR OF PUERTO RICO, ET AL., PETITIONERS

v.

CASPAR M. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Governor of Puerto Rico may obtain judicial review of his claim that the Navy has failed to comply with provisions of Military Construction Authorization Acts.

2. Whether the Noise Control Act of 1972 grants consent to a suit seeking to enjoin the use of federal government facilities under a state criminal nuisance statute.

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In the Supreme Court of the United States

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CASPAR M. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 643 F.2d 835. The opinion of the district court (Pet. App. 57a-178a) is reported at 478 F.Supp. 646.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981 (Pet. App. 55a-56a). A timely

petition for rehearing was denied on February 27, 1981 (Pet. App. 179a). The petition for a writ of certiorari was filed on May 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the Navy's use of part of Vieques Island, Puerto Rico, as a range for air-to-ground, naval gunfire support and amphibious weapons training. The island, located off the southeast coast of Puerto Rico, is approximately 20 miles long and has an average width of 4 miles. It consists of approximately 33,000 acres, of which the United States owns more than 25,000 acres. (Pet. App. 2a-3a.) Portions of the eastern end of the island are used by the Navy for weapons training (Pet. App. 6a-7a).

The weapons training areas on Vieques are part of a larger complex known as the Atlantic Fleet Weapons Training Facility, headquartered at Roosevelt Roads Naval Station in Ceiba, Puerto Rico. This complex consists of four ranges: (1) the outer range, a large area of ocean lying to the north and south of Vieques,[1] (2) the underwater range, located off the western shore of St. Croix, (3) the electronic warfare range consisting of a series of threat simulator platforms located on Puerto Rico, Vieques and other neighboring islands, and (4) the inner range. (Pet. App. 5a-6a.) Prior to 1975, the inner range consisted of naval gunfire, bomb and missile targets on Culebra, an island located nine miles north of Vieques, as well as on Vieques (*ibid.*). In 1969, a suit was filed to modify or enjoin Navy use of

[1] At its closest points, the outer range is 35 miles north of Vieques, and 20 miles to the south.

Culebra. *Feliciano* v. *United States*, 297 F. Supp. 1356 (D.P.R. 1969), aff'd, 422 F.2d 943 (1st Cir. 1970). As the district court commented in this case: "The Navy won that legal battle but lost the political war that ensued, which culminated in the cessation in 1975 of all weapons training activities in Culebra Island" (Pet. App. 148a).

The Military Construction Authorization Acts of 1971 and 1972, Pub. L. No. 91-511, 84 Stat. 1204 *et seq.*, and Pub. L. No. 92-145, 85 Stat. 394 *et seq.*, contained provisions directing the Secretary of Defense to prepare reports concerning the use of, and alternatives to the Navy facilities on Culebra (Pet. App. 10a-12a). On submitting these reports to Congress, Secretary Laird recommended that the Navy retain its training targets on Culebra (*id.* at 12a).

Nevertheless, in 1973, the new Secretary of Defense, Elliot Richardson, concluded that it was in the Defense Department's long-range interest to transfer Culebra training activities to the islands of Desecheo and Monita in the Mona Passage.[2] This relocation was to occur only after Congress had appropriated the necessary funds and the Navy had reached "a satisfactory overall arrangement with the government of Puerto Rico * * * for insuring the long-term continuation of the Atlantic Fleet Weapons Range * * *" (Pet. App. 12a). Congress thereupon enacted the Military Construction Authorization Act of 1974, Pub. L. No. 93-166, 87 Stat. 661 *et seq.* Section 204(a) of the Act, 87 Stat. 668, authorized the appropriation of $12 million for the "construction and equipage of substitute facilities in support" of the relocation of

[2] The selection of these islands as the new site for the Culebra targets was overturned in 1974 due to the status of the Mona Passage as an international strait.

operations from the island of Culebra. Section 204(b) of the Act, 87 Stat. 668, however, expressly conditioned the relocation on the conclusion of an agreement between the Navy and Puerto Rico, which was to be "reported to the Committees on Armed Services of the Senate and the House of Representatives prior to execution of such agreement." The agreement was to include a provision committing the Commonwealth to make available lands "for the long term continued use of the Atlantic Fleet Weapons Range and Fleet Marine Forces training areas by the Navy, including, but not limited to, present areas and facilities on the island of Vieques" (*ibid*).

In 1974, although no relocation site had been selected and no agreement with Puerto Rico concluded, the Secretary of State informed the Secretary of Defense of the President's decision to terminate training activities on Culebra and its surrounding cays by the end of 1975 (Pet. App. 13a). This decision left the targets and facilities on Vieques as the sole components of the inner range (Pet. App. 6a). None of the $12 million appropriated pursuant to the Military Construction Authorization Act of 1974, was expended in improving the facilities on Vieques;[3] prior to this suit in 1978, negotiations continued between the Commonwealth and the Navy over the selection of a site to replace Culebra (Pet. App. 13a-14a).

The targets of Vieques consist of artillery targets, two bull's-eye targets for inert air-to-ground bombing practice, strafing targets, a series of mock targets of

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[3] In fact, in 1980 Congress, recognizing that the $12 million appropriation had never been spent, reallocated the amount to another Navy construction project in the Indian Ocean. Supplemental Appropriations and Rescission Act, Pub. L. No. 96-304, 94 Stat. 857 *et seq.* (see Pet. App. 14a n.10).

opportunity (*e.g.*, mock surface to air missile sites, fuel farm, ammunition dump and airstrip) for live air-to-ground bombing practice, and two remote controlled moving targets. There are also six naval gunfire targets. (Pet. App. 7a.)[4] These targets are all in the eastern portion of the island. The artillery targets, the bull's-eye inert bombing targets, and the strafing targets are located in an area known as the Surface Impact Area (SIA). The western boundary of the SIA is nine kilometers from the closest portion of the civilian occupied area of Vieques. (*Ibid.*) The remaining targets are located to the east of the SIA, in an area known as the Air Impact Area or Close Air Support Zone (AIA/CAS). The closest point of the civilian zone is about 13 kilometers from the border of AIA/CAS. The area between the civilian zone and the SIA is occasionally used for amphibious landing exercises; it is also leased to the local cattle association for grazing purposes. (See Pet. App. 6a-8a).

Air and sea operations in the inner range occur about 200 days a year, between the hours of 7:30 a.m. and 10:00 p.m. Aircraft training on the range are forbidden to fly over civilian areas, and ordinarily come no closer to such areas than five miles. Vessels shooting at targets in the AIA/CAS are positioned three to eleven miles south of the island. A danger zone in the sea surrounding Vieques, which prohibits civilian navigation in the area, is activated when the range is in use. (Pet. App. 7a-8a.)

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[4] All these targets were installed prior to 1975. The only improvements of the facilities on Vieques since 1975 were a television scoring system for the bull's-eye targets, installed in 1976, and ship positioning radar, installed in 1977. (Pet. App. 157a.)

2. On March 1, 1978, the Governor of Puerto Rico, Carlos Romero-Barcelo, and others initiated a suit seeking to enjoin continued use of the island for weapons training. The complaint charged the Navy with violations of almost every piece of major environmental legislation enacted by Congress in the last decade, including the National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. III) 4321 *et seq.*; the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*; the Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. III) 7401 *et seq.*; the Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; the Endangered Species Act, 16 U.S.C. (& Supp. III) 1531 *et seq.*; the National Historic Preservation Act, 16 U.S.C. 470 *et seq.* (and Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971), *reprinted in* 16 U.S.C. 470 note, which implements that Act); the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.* In addition, the complaint claimed violations of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.*, and various amendments to the United States Constitution. Finally, the complaint charged that the use of Vieques for weapons training violated the congressional and presidential directives concerning cessation of Navy operations on Culebra. (See Pet. App. 60a-61a.)

The district court held an extensive hearing on the merits of these allegations. The hearing on motions for a preliminary injunction, later consolidated as a hearing on the merits, lasted approximately 50 days and included testimony by dozens of lay and expert witnesses. The district court also made two site visits to Vieques to inspect the inner range and

the surrounding waters, and to witness noise-producing Navy activity. (Pet. App. 61a.)

On September 17, 1979, the district court issued a comprehensive decision and order (Pet. App. 57a-178a). The court found the Navy to be in violation of three environmental statutes and ordered curative action.[5] All other claims were dismissed. In particular, the district court held that the Navy was not in violation of the Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.* It reasoned that the Puerto Rico nuisance statutes do not establish "requirements respecting control and abatement of environmental noise" within the meaning of the Noise Control Act, 42 U.S.C. 4903(b), because the Act contemplated federal compliance with specific standards, not a case-by-case inquiry concerning the reasonable use of property. (Pet. App. 109a-110a.) The district court also found (Pet. App. 110a) that "even under the most liberal interpretation of the Puerto Rican nuisance statute," the petitioners had failed to establish a nuisance as a factual matter (Pet. App. 110a-118a). It found that most of the sound in the civilian areas of Vieques comes from natural sources (biota—primarily tree frogs—rain and thunder) and the activities of the local residents (Pet. App. 115a). The court reviewed the evidence and concluded that the Navy activities—aircraft, bombing, and naval gunfire—added only an insignificant amount to the overall noise level on the

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[5] It found violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*; the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*; and Exec. Order No. 11593, *supra*, which implemented the National Historic Preservation Act, 16 U.S.C. 470 *et seq.* See our petition in *Weinberger* v. *Romero-Barcelo*, No. 80-1990, at pages 3-4, for a further description of the district court's findings of violations.

island (Pet. App. 116a-117a). As a result, the court ruled that the claims under the Noise Control Act, "lack a basis in fact as well as law" (Pet. App. 118a).

The district court also dismissed the petitioners' claims that the Navy had violated congressional and presidential directives concerning the cessation of activities on Culebra by using the facilities on Vieques. After reviewing the history of the Culebra controversy, the court ruled that there was no Navy-Commonwealth agreement restricting use of Vieques (Pet. App. 153a-154a), that internal executive directives were not enforceable through the judicial system (Pet. App. 154a), and that the Authorization Acts did not grant "the Commonwealth a veto power over Naval operations in Vieques" (Pet. App. 156a). The district court further concluded that the level and content of training necessary for military readiness were political questions and nonjusticiable (Pet. App. 162a-165a).

3. On appeal, the court of appeals ruled that noise abatement requirements applicable to federal facilities under the Noise Control Act are limited to "relatively precise standards capable of uniform application to similar sources of sound" (Pet. App. 39a). It found no jurisdiction under the Noise Control Act, either express or implied, to enforce the Puerto Rico criminal nuisance statute against a federal facility (Pet. App. 40a).

The appellate court also ruled that a cause of action could not be implied in favor of the Commonwealth to enforce the provisions of the Military Construction Authorization Acts (Pet. App. 13a-17a). It held that the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, did not provide an alternative

source for the cause of action to enforce the Acts because the Navy use of Vieques did not constitute agency action within the meaning of the APA (Pet. App. 18a). Even if agency action were involved, moreover, the court ruled that it would be unreviewable as action "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2), because the statutes cited by the Commonwealth did not provide the judiciary with any law to apply (Pet. App. 19a).

ARGUMENT

So far as challenged by the present petition, the decision of the court of appeals is correct, does not conflict with any decision of this Court or any court of appeals, and does not warrant review by this Court.[6]

1. Petitioners contend that the court of appeals' decision is in conflict with numerous cases of this Court and of other courts of appeals because it found no "agency action", subject to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the Navy's use of its training facilities on Vieques. The "agency action" in cases cited by petitioners include bringing a complaint against private business, *FTC* v. *Standard Oil Co. of California*, No. 79-900 (Dec. 15, 1980); revealing information supplied by private companies, *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); and administrative interpretations of the application of

[6] The issues raised by petitioners are not related to the issue raised by the government's petition in *Weinberger* v. *Romero-Barcelo*, No. 80-1990. It is accordingly appropriate to consider the two petitions separately, even though they arise from the same case. Petitioners do not suggest otherwise, either in the instant petition or in their opposition in No. 80-1990.

statutes to private business, *Atlantic Richfield Co.* v. *Federal Energy Administration*, 556 F.2d 542 (Temp. Emer. Ct. App. 1977); *National Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689 (D.C. Cir. 1971). These actions bear little resemblance to an agency's continued use of its own property.[7] While the term "agency action" covers a "broad spectrum" of administrative actions, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967), it is not so broad that it includes every action of every federal employee. *International Engineering Co.* v. *Richardson*, 512 F.2d 573, 580 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976). As the court of appeals noted (Pet. App. 18a), the statute defines "agency action" in terms that fundamentally involve administrative adjudication or rulemaking. The claimed "agency action" in this case does not remotely involve either of these administrative functions.[8]

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[7] Petitioners claim (Pet. 8-9) that the availability in this case of APA review under the National Environmental Policy Act and the National Historic Preservation Act contradicts the court's interpretation of "agency action." But the court of appeals did not consider any issue arising under NEPA, and only an NHPA issue involving a duty to locate historic sites under Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971). This duty was triggered by the Navy's ownership and control of the land; it was not based upon the existence of any proposed "agency action".

[8] Petitioners also suggest (Pet. 8) that the Navy's use of target facilities in Vieques constitutes an "order" within the meaning of the APA, 5 U.S.C. 551(13). The term "order," however, is more fully defined in 5 U.S.C. 551(6), as:

> [T]he whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.

In any event, the court of appeals ruled that, even if "agency action" were present, judicial review under the APA would be precluded by the exception in 5 U.S.C. 701(a)(2) for action committed to agency discretion by law (Pet. App. 18a-19a). Navy use of the target facilities on Vieques is authorized by 10 U.S.C. 5012, which directs the Navy to organize, train and equip a combat-ready fleet and naval aviation forces.[9] In general, military decisions concerning training and the use of facilities are political questions, ones that are committed to agency discretion by law. See *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). The level and type of training necessary to preserve the national security is not easily susceptible to judicial determination. *Rostker* v. *Goldberg*, No. 80-251 (June 25, 1981), slip op. 7. The court of appeals reviewed the Military Construction Authorization Acts invoked by petitioners and found in them no limitation on Navy discretion that could be applied to restrict the service's use of its target facilities on Vieques (Pet. App. 19a). For this reason, it ruled that the petitioners had no cause of action under the APA for lack of "law to apply" (*ibid.*).

Petitioners also contend that the court of appeals impermissibly meshed the tests for implication of the cause of action to enforce a statute and for the availability of judicial review of agency action under the APA (Pet. 9-12). The court's rejection of a cause of action under both theories, however, reflects not a merging of these two forms of action, but the content of the statutes upon which the petitioners rest their claims. As explained above, the court exam-

[9] See also 10 U.S.C. 5013, which provides for the organization, training and equipping of the Marine Corps.

ined the cited Military Construction Authorization Acts and found no limitation in them enforceable in an action under the APA to restrain the Navy's discretion to conduct necessary military training. The court also scrutinized these statutes to determine whether Congress intended to benefit petitioners, and to make that benefit enforceable through the courts (Pet. App. 13a-16a). On the basis of that scrutiny, the court found that the statutes were intended to safeguard the interests of the Navy rather than those of the Commonwealth of Puerto Rico (Pet. App. 14a). As a result, it held that no cause of action could be implied in favor of petitioners. See *Cort* v. *Ash*, 422 U.S. 66, 78 (1975); *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981).

2. Contrary to petitioners' suggestion (Pet. 15), the court of appeals' ruling concerning judicial enforcement of the federal facilities compliance provision of the Noise Control Act of 1972, 42 U.S.C. 4903, does not create a conflict with decisions of other courts. The present case represents the only court of appeals decision considering these provisions of the Noise Control Act. Also, both the citizens' suit provision and the federal facilities compliance provision, 42 U.S.C. 4903 and 4911, differ substantially from the equivalent provisions of the Clean Air Act Amendments of 1977 and the Clean Water Act.[10] Accord-

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[10] As noted by the court of appeals, the citizens' suit provisions of the Noise Control Act authorize actions only to enforce certain federal noise limitations or standards and not suits to enforce the federal facilities compliance provision. 42 U.S.C. 4911(f) (Pet. App. 34a-38a). The citizens' suit provisions of the Clean Water Act, 33 U.S.C. (Supp. III) 1365, and the Clean Air Act Amendments of 1977, 42

ingly, the court of appeals' determination that the federal courts lacked jurisdiction to entertain petitioners' Noise Control Act claims does not necessarily create a conflict with decisions construing these other statutes.

More significantly, the source of the conflict petitioners assert is the court of appeals' failure to find an implied cause of action to enforce the Noise Control Act in the savings clause in the citizens' suit provision (Pet. 16-17). In *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*,

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U.S.C. (Supp. III) 7604, in contrast both specifically authorize suits to enforce the federal facilities compliance provisions of those Acts. See *Hancock* v. *Train*, 426 U.S. 167, 196 (1976).

The federal facilities compliance provision of the Noise Control Act of 1972, 42 U.S.C. 4903, was modeled on the original compliance provision of the Clean Air Amendments of 1970. Section 118 of the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1689. *A Legislative History of the Noise Control Act of 1972*, 93d Cong., 2d Sess. 40 (Comm. Print 1974) (remarks of Sen. Tunney). In *Hancock* v. *Train, supra*, this Court construed the original federal compliance provision of the Clean Air Amendments of 1970 to require federal compliance with state and local substantive standards regarding pollution, but held that it did not subject federal facilities to state procedural requirements or state jurisdiction. 426 U.S. at 198-199. See also *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976). Subsequent to *Hancock* v. *Train, supra*, Congress amended the federal facilities compliance provisions of the Clean Air Act Amendments of 1977 (42 U.S.C. (Supp. III 7418) and the Clean Water Act (33 U.S.C. (& Supp. III) 1323), to subject federal facilities to state procedure and jurisdiction. The compliance provision of the Noise Control Act of 1972, 42 U.S.C. 4903, however, was not amended. Therefore, questions relating to enforcement of the federal facilities compliance provision of the Noise Control Act are not identical to those concerning the Clean Air Act and the Clean Water Act, and comparison with cases dealing with the latter two Acts is not always warranted.

No. 79-1711 (June 25, 1981), slip op. 13, this Court ruled that an implied cause of action to enforce the provisions of the Clean Water Act cannot be derived from the savings clause of the citizens' suit provisions in that Act. As a result, the conflict postulated by petitioners no longer exists.

Petitioners' claim (Pet. 15) that the court of appeals' decision leaves the federal compliance provision in the Noise Control Act unenforceable is also without merit. The court held that the Puerto Rico criminal nuisance statute did not create noise requirements applicable to federal facilities within the meaning of the Noise Control Act (Pet. App. 39a-40a). The opinion, however, left open the possibility of enforcement of uniform standards limiting the allowable "intensity, duration and character of sounds" against federal defendants under the APA (Pet. App. 38a-39a). The appellate court's distinction between nuisance statutes and uniform noise limitations standards is well supported. Under the Puerto Rico nuisance law, a case-by-case determination of the reasonableness of the defendant's activities is required in order to maintain "a balance between the defendant's right to the free use of his property and the rights of others to comfortable enjoyment of life or property" (Pet. App. 40a). See *Casiano Sales* v. *Lozada Torres*, 91 P.R.R. 473 (1964); *Arcelay* v. *Sanchez Martinez*, 77 P.R.R. 782 (1955).

In any event, the petitioners' contention (Pet. 18) that the "noise created by the use of live ordnance is excessive and significantly intrudes upon the daily life of Vieques residents" was rejected on the facts by the district court. That court held a 50-day hearing in this case, visited the island, and heard extensive testimony on noise from both lay and expert witnesses. (See Pet. App. 61a.) It meticulously evaluated all this

evidence (Pet. App. 110a-118a) and concluded, "even under the most liberal interpretation of the Puerto Rican nuisance statute * * * [petitioners] have failed to establish facts attributable to Defendant Navy justifying a conclusion that it is generating noise and shock waves of such magnitude as to interfere with either the health or property of the civilian residents of Vieques" (Pet. App. 110a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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